

# **CUSTOMS BULLETIN AND DECISIONS**

**Weekly Compilation of  
Decisions, Rulings, Regulations, Notices, and Abstracts  
Concerning Customs and Related Matters of the  
U.S. Customs Service  
U.S. Court of Appeals for the Federal Circuit  
and  
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T.D. 01-86

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**DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE**

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# U.S. Customs Service

## *Treasury Decision*

19 CFR Part 12

(T.D. 01-86)

RIN 1515-AC95

### IMPORT RESTRICTIONS IMPOSED ON ARCHAEOLOGICAL AND ETHNOLOGICAL MATERIALS FROM BOLIVIA

AGENCY: Customs Service, Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to reflect the imposition of import restrictions on certain archaeological and ethnological materials originating in Bolivia. These restrictions are being imposed pursuant to an agreement between the United States and Bolivia that has been entered into under the authority of the Convention on Cultural Property Implementation Act in accordance with the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The document amends the Customs Regulations by adding Bolivia to the list of countries for which an agreement has been entered into for imposing import restrictions. The document also contains the "Designated List of Archaeological and Ethnological Material From Bolivia" that describes the types of articles to which the restrictions apply.

EFFECTIVE DATE: December 7, 2001.

FOR FURTHER INFORMATION CONTACT: (Legal Aspects) Joseph Howard, Intellectual Property Rights Branch (202) 927-2336; (Operational Aspects) Al Morawski, Trade Operations (202) 927-0402.

#### SUPPLEMENTARY INFORMATION:

##### BACKGROUND

The value of cultural property, whether archaeological or ethnological in nature, is immeasurable. Such items often constitute the very essence of a society and convey important information concerning a people's ori-

gin, history, and traditional setting. The importance and popularity of such items regrettably makes them targets of theft, encourages clandestine looting of archaeological sites, and results in their illegal export and import.

The U.S. shares in the international concern for the need to protect endangered cultural property. The appearance in the U.S. of stolen or illegally exported artifacts from other countries where there has been pillage has, on occasion, strained our foreign and cultural relations. This situation, combined with the concerns of museum, archaeological, and scholarly communities, was recognized by the President and Congress. It became apparent that it was in the national interest for the U.S. to join with other countries to control illegal trafficking of such articles in international commerce.

The U.S. joined international efforts and actively participated in deliberations resulting in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231 (1972)). U.S. acceptance of the 1970 UNESCO Convention was codified into U.S. law as the "Convention on Cultural Property Implementation Act" (Pub.L. 97-446, 19 U.S.C. 2601 *et seq.*) ("the Act"). This was done to promote U.S. leadership in achieving greater international cooperation towards preserving cultural treasures that are of importance to the nations from where they originate and to achieving greater international understanding of mankind's common heritage.

During the past several years, import restrictions have been imposed on archaeological and ethnological artifacts of a number of signatory nations. These restrictions have been imposed as a result of requests for protection received from those nations as well as pursuant to bilateral agreements between the United States and other countries. More information on import restrictions can be found on the International Cultural Property Protection web site (<http://exchanges.state.gov/education/culprop>).

Import restrictions are now being imposed on certain archaeological and ethnological materials originating in Bolivia as the result of a bilateral agreement entered into between the United States and Bolivia (the Agreement). The Agreement was entered into on December 4, 2001, pursuant to the provisions of 19 U.S.C. 2602. The archaeological materials subject to the Agreement represent pre-Columbian cultures of Bolivia and range in date from approximately 10,000 B.C. to A.D. 1532. The ethnological materials subject to the Agreement are from the Colonial and Republican periods and range in date from A.D. 1533 to 1900.

Accordingly, § 12.104g(a) of the Customs Regulations is being amended to indicate that restrictions have been imposed pursuant to the Agreement between the United States and Bolivia. This document amends the regulations by imposing import restrictions on certain archaeological and ethnological materials from Bolivia as described below.

It is noted that emergency import restrictions on antique ceremonial textiles from Coroma, Bolivia were previously imposed but are no longer in effect. (See T.D. 89-37, published in the Federal Register (54 FR 17529) on March 14, 1989, and T.D. 93-34 published in the Federal Register (58 FR 29348) on May 20, 1993.) The restrictions published in this document are separate and independent from these previously imposed emergency import restrictions. This document removes the reference in the Customs Regulations in § 12.104g(b) to these expired emergency import restrictions.

#### MATERIAL ENCOMPASSED IN IMPORT RESTRICTIONS

In reaching the decision to recommend protection for the cultural patrimony of Bolivia, the Acting Assistant Secretary for Educational and Cultural Affairs of the U.S. State Department determined, pursuant to the requirements of the Act, that the cultural patrimony of Bolivia is in jeopardy from the pillage of archaeological and ethnological materials and this pillage is widespread, on-going, and systematically destroying the non-renewable archaeological and ethnological record of Bolivia.

The archaeological materials which are the subject of the Acting Assistant Secretary's determination represent pre-Columbian cultures of Bolivia, range in date from approximately 10,000 B.C. to A.D. 1532, and include: (1) objects comprised of textiles, featherwork, ceramics, metals, and lithics (stone); and (2) perishable remains, such as bone, human remains, wood, and basketry that represent cultures including but not limited to the Formative Cultures (such as Wankarani and Chiripa, Tiwanaku, and Inca), Tropical Lowland Cultures, and Aymara Kingdom. The ethnological materials which are the subject of the Acting Assistant Secretary's determination represent the Colonial and Republican periods, range in date from A.D. 1533 to 1900, and include: (1) objects of indigenous manufacture and ritual, sumptuary, or funeral use related to the pre-Columbian past, which may include masks, wood, musical instruments, textiles, featherwork, and ceramics; and (2) objects used for rituals and religious ceremonies, including Colonial religious art, such as paintings and sculpture, reliquaries, altars, altar objects, and liturgical vestments.

The Acting Assistant Secretary also determined, pursuant to the requirements of the Act, that the archaeological materials covered by the Agreement are of cultural significance because they derive from numerous cultures that developed autonomously in the Andean region and attained a high degree of technological, agricultural, and artistic achievement, but whose underlying political, economic, and religious systems remain poorly understood. Also, the archaeological materials represent a legacy that serves as a source of identity and pride for the modern Bolivian nation. The Acting Assistant Secretary determined that the ethnological materials play an essential and irreplaceable role in indigenous Bolivian communities and are vested with symbolic and historic meaning. They are used in ceremonial and ritualistic practices and frequently serve as marks of identity within the society. Serving as

testimony to the continuation of pre-Columbian cultural elements despite European political domination, they form an emblem of national pride in a society that is largely indigenous.

Also, pursuant to the requirements of the Act, the Acting Assistant Secretary determined that Bolivia has taken measures consistent with the Convention to protect its cultural patrimony, and that the application of import restrictions set forth in Section 307 of the Act is consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes.

#### DESIGNATED LIST

The bilateral agreement between Bolivia and the United States covers the categories of artifacts described in a "Designated List of Archaeological and Ethnological Material from Bolivia," which is set forth below. Importation of articles on this list is restricted unless the articles are accompanied by an appropriate export certificate issued by the Government of Bolivia or documentation demonstrating that the articles left the country of origin prior to the effective date of the import restriction.

#### LIST OF ARCHAEOLOGICAL AND ETHNOLOGICAL MATERIALS FROM BOLIVIA

##### *Archaeological Materials*

##### I. PRE-COLUMBIAN CERAMICS

Ceremonial, sumptuary, and funerary ceramics representing the following principal cultures:

##### *A. Formative Cultures (2000 B.C.-A.D. 400):*

*Decoration:* Ceramics are monochrome in appearance from the use of red, tan, or pale orange slip against a fire-clouded surface; some forms are black and finely polished. Some show use of polychrome slip paints in red, orange, black, and yellow. The surface exterior is polished or burnished. There is some use of applique and incision.

*Forms:* Plates (*ch'illami*), open bowls, vases, double-cylinder vases with bridge handles, beakers with vertical handles, pitchers, incense burners, portrait jars, handled funerary jars, boot-shaped jars, tripod-base jars, canoe-shaped bowls, double-spout bottles, effigy jars in the shape of humans, animals and birds, and figurines.

*Size:* Varies according to form; miniatures average 2 cm. in height while over-sized *ch'illamis* can average 70 cm. in width/rim diameter.

*Identifying features:* Formative Period ceramics are plain in appearance but their shapes are distinct. Some are miniature or over-sized (bowls, or *ch'illami*); asymmetrical or lop-sided (boot-shaped jars); and unconventional (beakers with vertical handles, canoe-shaped vessels, "genie lamp" shape).

*Styles:* Formative Period style ceramics are distributed throughout Bolivia. These include: Chiripa, Fluke, Kaluyo/Qaluyu, Wankarani, Salar de Uyuni, Urus, Chipayas, Tupuraya, Mojocoya, Pocona, Mizque, Aiquile, Beni, Pando, Santa Cruz regions, and Mojeñas styles. Other terms

used include: Quillacollo, Cliza, Llampara, Inquisivi, Navillera, Tapacari, Capinota, Parotani, Chullpa Pampa, Sacaba, Tiraque, Chullpa Pata, Santa Lucia, Arani, Sierra Mokho, and Sauces.

*B. Wankarani (1600 B.C.-A.D. 100):*

*Decoration:* Typically monochrome, slipped vessels in red or black and well-polished. Black stripes against a red surface are also common. Incision, punctate, and applique are used for surface decoration on effigy vessels.

*Forms:* Plates (*ch'illami*), open bowls, vases, beakers with vertical handles, pitchers, incense burners, portrait jars, double-spout bottles, funerary urns, ladles, conical vases with circular bases, effigy jars in the shape of humans, animals and birds, and figurines.

*Size:* Varies according to form.

*Identifying features:* Plain forms and monochrome surface decoration that is well-polished. Most rim edges show a slight, rounded scallop that often gives the appearance of a misshapen vessel.

*Styles:* Wankarani ceramics are limited in distribution to northeast of Lake Titicaca and north of Lake Poopo. The term Wankarani is sometimes used broadly to refer to all Formative Period ceramics.

*C. Chiripa (1500 B.C.-A.D. 200):*

*Decoration:* Generally red or black slipped surfaces, with cream, yellow, or black painted geometric designs. Effigy vessels and fineware jars are often painted and incised. Yellow-painted, incised, and modeled flat-based jars are distinct.

*Forms:* Bowls, vases, pitchers, jars, effigy jars, and figurines. Flat-based restricted bowls with small, animal-shaped lug handles are common.

*Size:* Varies according to form.

*Identifying features:* Yellow- or cream-painted on red, incised, and modeled flat-based jars and bowls are distinct. The walls of the vessels are thick (5 cm. to 8 cm.) and the rims are thickened. The painted decoration is geometric, rendered in wide strokes.

*Style:* Linked to the Wankarani and Tiwanaku I styles of the Bolivian highlands.

*D. Tiwanaku (A.D. 600-1200):*

*Decoration:* Well-fired (hard), polychrome pottery in black on red or combined black, red, yellow, orange, gray, brown, and white. Design motifs include human and divine representations, pumas, jaguars, birds, and geometric elements. On many beakers, the design is complex. Plastic decoration includes modeling, incision, and applique.

*Forms:* Bowls, plates, urns, vases, *lebrillos*, flat-bottomed beakers, incense burners (*sahumerios*), lamps (*mechero*), effigy jars, portrait vessels, bottles, flat-bottomed bottles, challadores, and some tripod forms. The rim edges of some beakers are scalloped.

*Size:* Varies according to form; storage jars are known to be up to one meter in height.

*Identifying features:* Tiwanaku finewares are typically polychrome and often exhibit complex images of cats, llamas, or personages bearing a staff in each outstretched arm. Beakers and plates often bear an open-mouthed feline or llama adornment along the rim edge. Some decorated jars (*lebrillos*) are short-bodied with disproportionately large, outflaring rims.

*Styles:* Tiwanaku I-V, Qalasasaya, Qeya, Yampara, Mollo, Omereque, Uruquilla, Quillacasa, Yura, Tupuraya, Ciaco, Mojocoya, Lakatambo, Colla, and Presto-Puno. Linked to the Wari style of Ayacucho, Peru, and the earlier Chiripa style of Bolivia.

*E. Aymara Kingdoms (A.D. 1200-1450):*

*Decoration:* Monochrome and polychrome painted vessels utilizing red, grey, orange, white, black, and reddish-brown for intricate geometric designs.

*Forms:* Bowl, vase (*lebrillo*), pitcher, jar, figurine, cup, beaker (*kero*), portrait vessel, plate, oil lamp (*mechero*), incense burner (*sahumerio*), and *challador*.

*Size:* Varies according to form.

*Identifying features:* After the demise of the Tiwanaku empire, local ceramic traditions re-emerged. Design elements such as color and placement on the vessel are retained from Tiwanaku styles, but religious personages and deities are replaced by abstract, geometric designs.

*Styles:* Mollo, Pacajes, Uruquilla, Yuna, Chaqui, Lupaqa, Karanga, Charcas, Killaqa, Karanka, Kara Kara, Ciaco, Chuyes, Tomatas, Yampará, and Mizque Regional. Also referred to as "Decadent Tiwanaku."

*F. Inca (A.D. 1450-1533):*

*Decoration:* Monochrome and polychrome painted vessels utilizing red, grey, orange, white, black, and reddish-brown for intricate geometric designs arranged in bands.

*Forms:* Cook pot, bowl, vase (*lebrillo*), pitcher, jar (*aribalo*), figurine, cup, *kero* (beaker), portrait vessel, plate, oil lamp (*mechero*), incense burner (*sahumerio*), funerary urn, bottle (*angara*), *challador*, storage vessel.

*Size:* Varies according to form; funerary urns and storage vessels can average one meter in height.

*Identifying features:* The most recognizable form of these ceramics is the flat-based beaker or *kero*. These average about 10 cm. in height and are painted with complex geometric and naturalistic designs in polychrome colors, often adorned at or near the rim by a modeled puma, llama, or jaguar head. *Keros* are often decorated in the style called Tocapu, an Inca design consisting of horizontally and vertically arranged squares with abstract and geometric motifs in each square.

*Styles:* Inca, Yampará, Lakatambo, Colla, Yura, and Pacajes.

*G. Tropical Lowland Cultures (1400 B.C.-A.D. 1533):*

*Decoration:* Often plain slipped in colors of red, tan, cream, orange, black, and yellow with bands of geometric designs.

*Forms:* Bowls, vases, pitchers, jars, funerary urn, plate, oil lamp, and *challador*.

*Size:* Varies according to form; some funerary urns are over one meter in height.

*Identifying features:* Soft pastes containing organic inclusions.

*Styles:* Casarabe, Mamoré, San Juan, Palmar, Vanegas, and Chané.

#### H. Ceramic Musical Instruments (*Formative Cultures—Inca, including Tropical Lowland Cultures*)

*Decoration/Form:* Ceramic musical instruments include whistles, flutes, rattles, and panpipes. Often plain slipped in colors of red, tan, cream, orange, black, and yellow or painted with intricate polychrome designs.

*Size:* Panpipes range between 20 cm. and 120 cm.; whistles and rattles are typically hand size; flutes range from 20 cm. to 120 cm.

*Styles and distribution:* Whistle/flute (*ocarina* or *silbato*); Rattle (*sonajera*); Flute/panpipe (*zampoña*). Distributed throughout all parts of Bolivia.

## II. PRE-COLUMBIAN TEXTILES

Ceremonial, sumptuary, and funerary textiles representing the following principal cultures:

### A. *Tiwanaku*:

1. Shawl/mantle (*awayo, ahuyo, lliclla, llacota*): Square or rectangular garment composed of two pieces of cloth sewn together. Woven from cotton and/or camelid fibers and dyed with natural pigments in red, blue, green, orange, yellow, tan, brown, black, purple, or a combination of colors. Fabric designs include: (1) stripes arranged across the cloth in a vertical or horizontal pattern; (2) repetitive arrangements of llamas or other animal motifs; (3) patterns created from tie-dye, checkerboards, and repetitive squares or cloth patchwork. Average size is one square meter.

2. Tunic (*unku, ccahua*): Man's ceremonial vestment constructed from one piece of cloth which is folded in half and sewn up the sides, leaving openings for the arms at the top and an opening in the middle for the head. Woven from cotton and/or camelid fibers, often in tapestry weave, and dyed with natural pigments in red, blue, green, orange, yellow, tan, brown, black, purple, or a combination of colors. Designs are typically found in the hip, sleeve, and neck areas but there are more elaborate examples where designs cover the entire garment: (1) stripes arranged across the cloth in a vertical or horizontal pattern; (2) repetitive arrangements of llamas or other animal motifs; (3) patterns created from tie-dye, checkerboards, repetitive squares or cloth patchwork. Average size is 135 cm. x 92 cm.

3. Belts and bagbelts (*chumpi, wak'a*): Worn by both men and women, woven from cotton or camelid fibers in a variety of widths, lengths, and colors. Found in either a solid color or simple polychrome geometricized design. Bag belts are long rectangular sashes comprised of one piece of

cloth folded length-wise that contain an opening in the top and are secured to the waist by braided straps.

4. Hat, headband: Includes polychrome caps, four-cornered hats with tassels (*gorro*), headbands, and small cloths sometimes used as head-coverings by women (*icuña*) which were either woven or knotted and dyed with natural pigments in red, blue, green, orange, yellow, tan, brown, black, purple, or a combination of colors. When present, designs are geometric or depict highly stylized animals, such as llamas and other camelids.

5. Bag/pouch (*ch'uspa*, *huallquepo*): Carried by both men and women; woven from cotton or camelid fibers in a variety of widths, lengths and colors. Found in either a solid color or simple polychrome stripe pattern arrangement with geometric motifs. These bags are usually square (20 cm.) or rectangular with a woven carrying strap. They often contain small pockets on the pouch exterior and are decorated with tassels.

6. Cloth: Square, rectangular, or fragmentary cloth woven from cotton or camelid fibers, or constructed from soft tree bark or other natural fiber, and dyed with natural pigments in red, blue, green, orange, yellow, tan, brown, black, purple, or a combination of colors. Some examples are striped in a vertical or horizontal pattern. Tapestry wall-hangings often exhibit complex geometric or animal designs arranged in repetitive patterns. Average size ranges between six square centimeters and six square meters. Cloth may be fragmentary, folded flat, or bundled (*q'epi*) for use in ritual ceremonies. Women's ritual cloth, called *icuña* or *tari*, is also included in this category.

7. Featherwork: Colorful, tropical feathers attached to leather, cloth, wood, or other material, such as basketry, to create adornments worn on the wrists, ankles, neck, waist, back, and head, including the lips and ears. Most typically found are headdresses, which may consist of small crowns (30 cm. average) or large, towering bonnets of feathers (80 cm.). This category also includes feather-covered ritual belts and textiles (35–70 cm.), fans (250 cm. long), staves or batons (145–250 cm.), basketry supports, and healer's amulets or *photadi* (80–250 cm.).

#### B. Aymara Kingdom:

1. Shawl/mantle (*awayo*, *ahuayo*, *lliclla*, *llacota*, *iscayo*): Square or rectangular garment composed of two pieces of cloth sewn together. Woven from cotton or camelid fibers and dyed with natural pigments in red, blue, green, orange, yellow, tan, brown, black, purple, or a combination of colors. Designs are typically stripes arranged across the cloth in a vertical or horizontal pattern or along the margins of the garment. Average size is one square meter.

2. Tunic (*unku*, *ccahua*): Man's ceremonial vestment constructed from one piece of cloth which is folded in half and sewn up the sides, leaving openings for the arms at the top and an opening in the middle for the head. Woven from cotton or camelid fibers and dyed with natural pigments in red, blue, green, orange, yellow, tan, brown, black, purple, or a combination of colors. Designs are typically found in the hip, sleeve, and

neck areas, but there are examples of more elaborate designs which cover the entire garment; plain vertical stripe designs across the garment are also known. Average size is 135 cm. x 92 cm.

3. Dress (*aksu/urku*): Woman's ceremonial vestment woven from camelid fiber constructed from one piece of cloth that is wrapped around the body. These are dyed with natural pigments in red, blue, green, orange, yellow, tan, brown, black, purple, or a combination of colors. The vestments are plain or striped. Average length is 1.5 meters.

4. Belts and bagbelts (*chumpi, wak'a*): Worn by both men and women; woven from cotton or camelid fibers in a variety of widths, lengths, and colors. Found in either a solid color or simple polychrome geometricized design. Bag belts are long rectangular sashes comprised of one piece of cloth folded length-wise that contain an opening in the top and are secured to the waist by braided straps.

5. Hat (*chucu*) or headband: The Aymara *chucu* is a conical shaped cap that is attached to the head with a headband. These were woven from camelid fibers and dyed with natural pigments in red, blue, green, orange, yellow, tan, brown, black, purple, or a combination of colors. When present, designs are geometric or depict highly stylized animals, such as llamas and other camelids.

6. Bag/pouch (*ch'uspa, huallquepo, istalla*): Carried by both men and women, woven from cotton or camelid fibers in a variety of widths, lengths, and colors. Found in either a solid color or simple polychrome stripe pattern arrangement with geometric motifs. These bags are usually square (20 cm.) or rectangular with a woven carrying strap. They often contain small pockets on the pouch exterior and are decorated with tassels.

7. Cloth: Square, rectangular, or fragmentary cloth woven from cotton or camelid fibers, or constructed from soft tree bark or other natural fiber, and dyed with natural pigments in red, blue, green, orange, yellow, tan, brown, black, purple, or a combination of colors. Some examples are striped in a vertical or horizontal pattern. Average size ranges between six square centimeters and six square meters. Cloth may be fragmentary, folded flat, or bundled (*q'epi*) for use in ritual ceremonies. Woman's ritual cloth, called *icuña* or *tari*, is also included in this category.

8. Featherwork: Consists of colorful, tropical feathers attached to leather, cloth, wood, or other material, such as basketry, to create adornments worn on the wrists, ankles, neck, waist, back, and head, including the lips and ears. Most typically found are head dresses, which may consist of small crowns (30 cm. average) or large, towering bonnets of feathers (80 cm.). This category also includes feather-covered ritual belts and textiles (35–70 cm.), fans (250 cm. long), staves or batons (145–250 cm.), basketry supports, and healer's amulets or *photadi* (80–250 cm.).

#### C. Inca:

1. Shawl/mantle (*awayo, ahuyo, lliclla, llacota, iscayo*): Square or rectangular garment composed of two pieces of cloth sewn together. Woven from cotton or camelid fibers and dyed with natural pigments in red,

blue, green, orange, yellow, tan, brown, black, purple, or a combination of colors. Designs are typically stripes arranged across the cloth in a vertical or horizontal pattern or along the margins of the garment. Average size is one square meter.

2. Tunic (*unku*, *ccahua*): Man's ceremonial vestment constructed from one piece of cloth which is folded in half and sewn up the sides, leaving openings for the arms at the top and an opening in the middle for the head. Woven from cotton and/or camelid fibers, often in tapestry weave, and dyed with natural pigments in red, blue, green, orange, yellow, tan, brown, black, purple, or a combination of colors. Designs are typically found in the hip, sleeve, and neck areas, but there are more elaborate examples where designs cover the entire garment: (1) stripes arranged across the cloth in a vertical or horizontal pattern; (2) repetitive arrangements of llamas or other animal motifs; (3) patterns created from tie-dye, checkerboards, and repetitive squares or cloth patchwork. Tunics are often decorated in the style called Tocapu, an Inca design consisting of horizontally and vertically arranged squares with abstract and geometric motifs in each square. Average size is 135 cm. x 92 cm.

3. Dress (*aksu/urku*): Woman's ceremonial dress woven from camelid fiber and constructed from a rectangular, two-piece cloth that is wrapped around the body and tied at the waist. These are dyed with natural pigments in red, blue, green, orange, yellow, tan, brown, black, purple, or a combination of colors. The vestments are normally plain or striped, but during the Inca Period, many were made from *cumbi* (see Inca cloth) and decorated in striped patterns (usually horizontal) of geometric motifs. Average length is 1.5 meters.

4. Belts and bagbelts (*chumpi*, *wak'a*): Worn by both men and women, woven from cotton or camelid fibers in a variety of widths, lengths, and colors. Found in either a solid color or simple polychrome geometricized design. Bag belts are long rectangular sashes comprised of one piece of cloth folded length-wise that contain an opening in the top and are secured to the waist by braided straps.

5. Hat (*chuc*, *ñañaca*) or headband: The *chucu* is a conical shaped cap that is attached to the head with a headband. These were woven from camelid fibers and dyed with natural pigments in red, blue, green, orange, yellow, tan, brown, black, purple, or a combination of colors. When present, designs are geometric or depict highly stylized animals, such as llamas and other camelids. Ñañacas are head coverings worn by women that range in size between 10 square cm. and one square meter.

6. Bag/pouch (*ch'uspa*, *huallquepo*, *istalla*): Carried by both men and women; woven from cotton or camelid fibers in a variety of widths, lengths, and colors. Found in either a solid color or simple polychrome stripe pattern arrangement with geometric motifs. These bags are usually square (20 cm.) or rectangular with a woven carrying strap. They often contain small pockets on the pouch exterior and are decorated with tassels.

7. Cloth and *cumbi*: Square, rectangular, or fragmentary cloth woven from fine cotton and/or camelid fibers, or constructed from soft tree bark or other natural fiber, and dyed with natural pigments in red, blue, green, orange, yellow, tan, brown, black, purple, or a combination of colors. Some examples are striped in a vertical or horizontal pattern. Average size ranges between six square centimeters and six square meters. Cloth may be fragmentary, folded flat, or bundled (*q'epi*) for use in ritual ceremonies. Woman's ritual cloth, called *icuña*, *tari*, or *ñañaca*, is also included in this category. *Cumbi*, or "royal Inca cloth," refers to a finely woven, soft cloth produced for Inca dignitaries and is analogous to gold in value. Often baby alpaca wool was utilized.

8. Knotted Strings or *quipu* (*k'ipu*, *kipu*): *Quipus* are knotted string devices used to count and record. They were created from woven cotton and/or camelid fiber twine. They appear as sets of knotted strings in colors, such as tan, cream, brown, or coffee. *Quipus* range in size from hand-size to 2.5 meters in length.

9. Featherwork: Colorful, tropical feathers attached to leather, cloth, wood, or other material to create adornments worn on the wrists, ankles, neck, waist, back, and head, including the lips and ears. Most typically found are headdresses, which may consist of small crowns (30 cm. average) or large, towering bonnets of feathers (80 cm.). This category also includes feather-covered ritual belts and textiles (35–70 cm.), fans (250 cm. long), staves or batons (145–250 cm.), basketry supports, and healer's amulets or *photadi* (80–250 cm.).

#### *D. Tropical Lowland Cultures:*

1. Cloth: Square, rectangular, or fragmentary cloth woven from cotton, or constructed from soft tree bark or other natural fiber, and dyed with natural pigments in red, blue, green, orange, yellow, tan, brown, black, purple, or a combination of colors. Some examples are striped in a vertical or horizontal pattern. Average size ranges between six square centimeters and six square meters. Cloth may be fragmentary, folded flat, or bundled (*q'epi*) for use in ritual ceremonies.

2. Featherwork: Colorful, tropical feathers attached to leather, cloth, wood, or other material to create adornments worn on the wrists, ankles, neck, waist, back, and head, including the lips and ears. Most typically found are headdresses, which may consist of small, modest crowns (30 cm. average) or large, towering bonnets of feathers (80 cm.). This category also includes feather-covered ritual belts and textiles (35–70 cm.), fans (250 cm. long), staves or batons (145–250 cm.), and healer's amulets or *photadi* (80–250 cm.).

### III. PRE-COLUMBIAN METALS

Ceremonial, sumptuary, and funerary metal objects produced and used by indigenous cultures from the Formative Period to A.D. 1533:

A. Axe: Made of copper, bronze, or gold. Generally flat with rounded head and attached to a handle. Average size is 15 cm. long x 10 cm. wide.  
Formative Cultures—Inca.

B. Chisel: Made of copper, bronze, silver, gold, or tumbaga. Long stem (50 cm.) terminates at short bulbous head (10 cm.). Formative Cultures—Inca.

C. Clamps/tweezers: Made of copper, bronze, silver, gold, or tumbaga. Short stem (5 cm.) attaches to thin, flat heads, sometimes decorated (10 cm.). Formative Cultures—Inca.

D. Knife (*tumi*): Made of copper, bronze, silver, gold, or tumbaga. Flat surface with trapezoidal or squared handle and ovaloid or half-moon blade. Often incised, embossed, or applique decoration at base. Average size is 50 cm. in height. Formative Cultures—Inca.

E. Crown: Made of gold or silver. Generally flat metal with animal, bird, or geometric designs. Average size is 14 cm. in diameter. Formative Cultures—Inca.

F. Diadem: Made of gold or silver. Generally flat with animal, bird, or geometric designs. Average size is 35 cm. long x 45 cm. wide. Formative Cultures—Inca.

G. Bracelet: Made of copper, bronze, silver, gold, or tumbaga. Usually tubular form. Average size is 11 cm. in diameter. Formative Cultures—Inca.

H. Collar: Made of copper, bronze, silver, gold, or tumbaga. Normally a thin (4 cm.) band without clasps. Sometimes contains beads, disks, or pendants. Formative Cultures—Inca.

I. Earring or ear plug: Made of copper, bronze, silver, gold, or tumbaga. Generally discoid, ring shape, or pendant. Often inlaid with semi-precious stones or shell. Average size is 4 cm. in diameter. Tiwanaku—Inca.

J. Necklace: Made of copper, silver, gold, or tumbaga. Normally a thin (4 cm.) band without clasps. Sometimes contains beads, disks, or pendants. Formative Cultures—Inca.

K. Nose plug (*nariguera*): Made of copper, silver, gold, or tumbaga. Either ring shaped (plain, thin band) or a circular band with applique. Average size is 3 cm. in diameter. Formative Cultures—Inca.

L. Belt: Made of copper, bronze, silver, gold, or tumbaga. Usually consists of joined disks or chain links. Average size is one meter in length. Formative Cultures—Inca.

M. Figurine: Made of copper, bronze, silver, gold, or tumbaga. Usually human or animal (camelid) shape. Often found in pairs. Range in size from miniatures (2 cm. in height) to small statuettes (50 cm. in height). *Lauraques* are small (3 cm. to 7 cm.) amulet-like figurines of brass shaped like humans. Formative Cultures—Inca.

N. Mask: Made of copper, bronze, silver, gold, or tumbaga. Usually hammered, unadorned metal plaque that is sometimes inlaid with semi-precious stone or shell. Motifs include felines and humans or combinations of the two. Average size is 30 square cm.

O. Pectoral: Made of copper, silver, gold, or tumbaga. Flat surface with squared base and curved edge. Often decorated with fine incised lines. Average size is 70 cm. in height. Formative Cultures—Inca.

P. Sheet/plaque: Thin, hammered sheets of copper, silver, gold, or tumbaga. Often incised or embossed. Size varies. Formative Cultures—Inca.

Q. Garment pin (*tupu*): Made of copper, bronze, silver, gold, or tumbaga. A large pin with a long shaft (15 cm.) that usually terminates with flat, discoid head (4 cm.) often embossed with design. Tiwanaku—Inca.

#### IV. PRE-COLUMBIAN STONE

Ceremonial, sumptuary, and funerary stone objects produced and used by indigenous cultures from the Archaic period to A.D. 1533:

A. Projectile point: Made of red, black, brown, or transparent obsidian, chert, basalt, or other semi-precious stone. Leaf-shape, with or without stem. Average size is 7 cm. long x 3 cm. wide. Formative Cultures—Inca, including Tropical Lowland Cultures. Locally known as Vizcachani style.

B. Axe: Made of red, black, brown or transparent obsidian, chert, basalt, or other semi-precious stone. Leaf-shape, or rectangular shaped head, with or without notches where handle is attached. Average size is 12 cm. long x 6 cm. wide. Formative Cultures—Inca, including Tropical Lowland Cultures.

C. Sword: Made of red, black, brown or transparent obsidian, chert, basalt, or other semi-precious stone. Oblong, leaf-shaped, with or without notches where handle is attached. Formative Cultures—Inca, including Tropical Lowland Cultures.

D. Bead: Made of lapis lazuli, sodalite, obsidian, quartz, malachite, green stone, or other semi-precious stone. Usually are globular with fine aperture; pendants are also known. Average size is 1 cm., although much larger (4 cm.) and much smaller (2 mm.) sizes are recognized. Formative Cultures—Inca.

E. Lip plug: Made of lapis lazuli, sodalite, obsidian, quartz, malachite, green stone, or other semi-precious stone. Normally of discoidal shape. Average size is 2.5 cm. Formative Cultures—Inca, including Tropical Lowland Cultures.

F. Idol/*conopa*/figurine: Small human or animal shaped statuettes of turquoise, alabaster, lapis lazuli, sodalite, obsidian, quartz, malachite, green stone, or other semi-precious stone. Exterior is finely polished. Often found in matching pairs. Animals are usually camelids. Average size is 5 cm. in height. Formative Cultures—Inca, including Tropical Lowland Cultures.

G. Drinking vessel (*kero*): These are vase-shaped beakers, about 15 cm. in height, made from grey andesite or basalt. They often exhibit a puma or jaguar face on the vessel exterior or other stylized geometric design. Tiwanaku—Inca.

H. Snuff tablet: These are shallow, rectangular trays approximately 20 cm. long x 5 cm. wide x 1 cm. in height. May be constructed of andesite, basalt, alabaster, or other semi-precious stone, or of wood. These small trays are often carved with intricate designs and inlaid with semi-precious stone and/or shell. Formative Cultures—Inca, including Tropical Lowland Cultures.

### I. Sculpture:

1. Tenon head: Made of sandstone, basalt, granite, volcanic tuff, or other stone. These are carved ashlar stone heads, normally in the shapes of masked humans, jaguars, and pumas that either serve as architectural wall embellishments at temples and religious shrines or are portions of free-standing monoliths (*see also* stelae, monolith). Small round heads average 50 square cm., while the heads of columnar stelae average one square meter. Formative Cultures—Inca.

2. Animal-shaped: Made of sandstone, basalt, granite, volcanic tuff, or other stone. These are carved statues of the head and neck portions of llamas and other animals. Because they are not supported by a base or pedestal, they are unable to free-stand. Average size is 2 meters in height. Mostly Formative Cultures.

3. Plaques (*lapida*): Made of sandstone, basalt, granite, limestone, volcanic tuff, or other stone. These are rectangular ashlar slabs, 52 cm. long x 39 cm. wide x 3.5 cm. thick that are sculpted on both faces with elaborate human, animal, and geometric designs. Mostly Wankarani, Chiripa, and Formative Cultures.

4. Stelae: Made of sandstone, granite, andesite, or other stone. Includes free-standing columnar figures, inscribed columns, and door jambs. These are typically engraved with masked figures and other personages. Between one and three meters in height. Formative Cultures—Inca.

5. Monolith: Free-standing columnar sandstone, granite, andesite, or other stone. Between one and three meters in height. Formative Cultures—Inca.

J. Rock art: Made of sandstone, basalt, granite, limestone, volcanic tuff or, other stone. These are portions of larger boulders or cave faces that have been chiseled off. They contain simple images, either painted, carved, or incised, of animals, humans, geometric, and abstract designs. Sizes range between hand-size and several square meters. Formative Cultures—Inca.

## V. PRE-COLUMBIAN SHELL FIGURINES

Ceremonial, sumptuary, and funerary shell figurines produced and used by indigenous cultures from the Formative period to A.D. 1533. Small human or animal shaped statuettes of *spondylus*, mother-of-pearl, and/or other shell. Exterior is finely polished. Often found in matching pairs. Animals are usually camelids. Average size is 5 cm. in height. Formative Cultures—Inca, including Tropical Lowland Cultures.

## VI. PRE-COLUMBIAN MUMMIFIED HUMAN REMAINS

Whole or partial mummified human remains, including modified skulls. May be wrapped in textiles. Individual limbs often contain bracelets and other precious metal and shell objects.

## VII. PRE-COLUMBIAN BONE OBJECTS

Ceremonial, sumptuary, and funerary bone objects produced and used by indigenous cultures from the Formative period to A.D. 1533:

A. Punch: Spike-like implement approximately 14 cm. long and 1 cm. wide that tapers to a pointed, sharp head. Formative Cultures—Inca, including Tropical Lowland Cultures.

B. Needle: Vary in size from 5 cm. to 15 cm. in length. Formative Cultures—Inca, including Tropical Lowland Cultures.

C. Hook: Semicircular implement of polished bone that often contains barb. Approximately 2 cm. in height. Formative Cultures—Inca, including Tropical Lowland Cultures.

D. Figurine: Usually human or animal (camelid) shape. Often found in matching pairs. Range in size from miniatures (2 cm. in height) to small statuettes (50 cm. in height). Formative Cultures—Inca.

E. Spindle: Long, spine-like object used in weaving to wind thread in conjunction with a spindle whorl. Appear as elongated needles with dull edges. Average size is 17 cm. long x 5 mm. wide. Formative Cultures—Inca.

F. Spindle whorl: Small globular, bead-shaped, or flat circular object that adds weight and balance to spindles used to wind thread. The whorl attaches to the spindle via an aperture in the whorl. Often engraved on the exterior with intricate designs. Bead size averages 2 square centimeters. Flat disks range from 3 cm. to 7 cm. in diameter. Formative Cultures—Inca.

G. Snuff tablet: These are shallow, rectangular trays approximately 20 cm. long x 5 cm. wide x 1 cm. in height. May be constructed of bone, stone, or wood. These small trays are often carved with intricate designs and inlaid with semi-precious stone and/or shell. Formative Cultures—Inca, including Tropical Lowland Cultures.

H. Inhaler tube: Small bones that have been hollowed, polished, and decorated on the exterior with engraved and polychrome painted designs. Average size is 8 cm. long x 3 cm. in diameter. Formative Cultures—Inca, including Tropical Lowland Cultures.

I. Amulet/talisman (*tembeta*): Can consist of a single bone engraved on the exterior with a design or a bead, amulet, or charm made from bone that has been polished, carved, and/or painted. Size ranges from 2 cm. to 40 cm. Formative Cultures—Inca, including Tropical Lowland Cultures.

J. Lip plug: Either ring shaped (plain, thin band) or disk shaped. Average size is 3 cm. in diameter. Formative Cultures—Inca, including Tropical Lowland Cultures.

K. Flute or panpipe (*zampoña*): Panpipes range between 20 cm. and 120 cm.; flutes range from 20 cm. to 120 cm. Formative Cultures—Inca, including Tropical Lowland Cultures.

## VIII. PRE-COLUMBIAN WOOD OBJECTS

Ceremonial, sumptuary, and funerary wood objects produced and used by indigenous cultures from the Formative period to A.D. 1533:

A. Drinking vessel (*kero*): These are vase-shaped beakers, about 15 cm. in height. A puma or jaguar face is often modeled onto the vessel exterior and/or the wood is carved or engraved with a stylized geometric design. Tiwanaku—Inca.

B. Snuff tablet: Shallow, rectangular trays approximately 20 cm. long x 5 cm. wide x 1 cm. in height. May be constructed of wood, bone, or stone. These small trays are often carved with intricate designs and inlaid with semi-precious stone and/or shell. Formative Cultures—Inca, including Tropical Lowland Cultures.

C. Bowl or *challador*: Compartmented bowl carved from a single slab of wood, with or without handles. Carved or engraved decoration on the surface exterior. Size ranges from 9 cm. to 17 cm. in height.

D. Arrow shaft: Created from a solid piece of wood. Often tipped with gold spear. Size varies from 30 cm. to 3 meters long.

E. Necklace: A thin strip (4 cm.) without clasps. Sometimes contain beads, disks, seeds, or pendants. Formative Cultures—Inca.

F. Mask: These are created from a single slab of wood. Often carved in the shape of feline or human face, with slits for the eyes and mouth. Average size is 30 square cm. and 3 cm. thick. Formative Cultures—Inca, including Tropical Lowland Cultures.

G. Digging stick: These implements most often take the form of a central staff (one meter in height) to which an appendage is added. The central staff is often carved. The appendage may be secured to the staff with bands of precious metals such as gold. Inca Culture.

H. Spindle whorl: Small globular, bead-shaped, or flat circular object that adds weight and balance to spindles used to wind thread. The whorl attaches to the spindle via an aperture in the whorl. Often engraved on the exterior with intricate designs. Bead size averages 2 square centimeters. Flat disks range from 3 cm. to 7 cm. in diameter. Formative Cultures—Inca.

#### IX. PRE-COLUMBIAN BASKETRY

Ceremonial, sumptuary, and funerary basketry produced and used by indigenous cultures from the Formative Period to A.D. 1533:

A. Basket: Round, square, or rectangular containers with or without handles. May be constructed of reeds, vines, grasses, or other vegetal fibers. Sometimes construction is combined with cloth, animal skin, or wood. Size varies from 4 cm. to 1 meter in height. Formative Cultures—Inca, including Tropical Lowland Cultures.

B. Casket: Square or rectangular containers with lids and handles. May be constructed of reeds, vines, grasses, or other vegetal fibers. Sometimes construction is combined with cloth, animal skin, or wood. Size varies from 50 cm. to 1 meter in height. Formative Cultures—Inca, including Tropical Lowland Cultures.

C. Headdress: These are supports for featherwork worn on the head. Can be up to 60 cm. in length/height. Formative Cultures—Inca, including Tropical Lowland Cultures.

### *Ethnological Materials*

Ethnological materials date from A.D. 1533 to 1900. Two broad categories are encompassed in the sections below. Sections I to VI describe artifacts that reflect Pre-Columbian traditions and are considered religious in nature or are critically linked to indigenous identity and ancestral use and/or manufacture. Section VII encompasses artifacts produced for use in Catholic religious observance. Some of these items may occur in archaeological contexts.

#### I. COLONIAL AND REPUBLICAN MASKS (A.D. 1533-1900)

These masks are constructed of wood, leather or skins, silver, tin, cloth, glass beads, oil painted plaster, fur, feathers, or some combination of these materials, with the intent of exaggerating the facial features, particularly the eyes and mouth, of the personage or animal in the dance. Common themes include the devil with horns, old men (*Auki*), African faces (*Moreno*), blonde haired/blue eyed men with bullet holes in their foreheads (*Chunchus*), angels, heroines (*China Supay*), and animals. Size varies according to the mask. Some are as small as 40 cm. or as large as 170 cm.

All masks produced until 1900 that are associated with the Christian or indigenous dance rituals of the Colonial and Republican Periods are included. These include but are not limited to masks of the following dances: Dance of La Diablada; Dance of La Morenada; Dance of Kullawada; Dance of La Llamera; Dance of the Chunchus; Chutas Dance; Kusillos Dance; Chiriguano Dance; Dance of the Inca; Dance of the Chunchos; Dance of the Achus; Dance of St. Ignatius of Moxos; Dance of the Little Angels; Moors and Christians Dance; Dance of the Sun and the Moon; Dance of the Little Bull; Dance of the Jucumari; Chiriguano Ritual; Dance of the Auqui Auqui; Dancer Ritual; Dance of the Misti'I Siku; Dance of the Little Bull; Dance of the Tundiquis; Dance of the Paqochis.

#### II. COLONIAL AND REPUBLICAN WOOD OBJECTS (A.D. 1533-1900)

Objects in wood that relate to indigenous ceremonial activities. These include:

A. Drinking vessels (*kezo, keru, q'ero*): These are vase-shaped beakers, about 15 cm. in height. During the Colonial Period, these wooden cups were polychrome painted with elaborate scenes and designs.

B. Scepter (*Bastón de mando*): Wooden staff made of palm wood and encased in silver with semi-precious stones. Size varies from 45-120 cm.

C. Ceremonial vessels (*challador* cups/vases): The interiors of these vessels are segmented into compartments. Size ranges between 10-35 cm.

D. Bow: Constructed with wood, feathers, and other animal and vegetal fibers. Used for ritual purposes by the Araona Culture of the Tropical Lowlands. Size ranges from 120 cm. to 210 cm.

E. Tobacco pipe: Straight tubular shape, without a bowl, used by Tropical Lowland Cultures in religious ceremonies. Often, an X is

painted as a clan symbol on one end of the tube. Size ranges from 10 cm. to 15 cm.

### III. COLONIAL AND REPUBLICAN MUSICAL INSTRUMENTS (A.D. 1533-1900)

Musical instruments created for and used in indigenous ceremonies. These include:

A. *Charango*: Stringed instrument, similar to a mandolin or ukelele, manufactured of wood. The bowl of the instrument is sometimes decorated with animal pelts. About 50 cm. in length.

B. Drum (*Sancuti bombo*, *Wankara bombo*, *muyu muyu*, *q'aras*): Vary in size and shape. Generally the box is cylindrical and made of wood or tree bark with skins stretched over the frame to form the heads. Size ranges from 30 cm. to 60 cm.

#### C. Flutes:

1. Flute (*rollano*, *chaxes*, *lawatos*): Made of hollowed wood with leather strips. These flutes are characterized by six holes. Size ranges from 40 cm. to 100 cm.

2. Flute (*chutu pinquillo*): Made of uncut flamingo bone with six holes. Size ranges from 25 cm. to 35 cm.

3. Flute (*pifano*): Made of bato bone. Size varies.

4. Flute (*jantarco*, *sicus*): Made of wood with flower designs engraved on the surface. Diamond shaped in cross-section. Size varies from 10 cm. to 35 cm.

D. Harp: Stringed instrument made of wood and animal skin. It contains 30 strings. Size ranges from 80 cm. to 150 cm.

E. Mandolin: Constructed of wood and often inlaid with shell. Size varies.

F. Whistle (*ocarina*, *willusco*): Small, hand-held whistle made of wood, 7 cm. Willusco is small, disk shaped whistle with design engraved on surface, 3 cm. to 7 cm.

G. Panpipe (*bajón*): Made of leaves formed into tubes, attached to each other with cotton thread. Characterized by 10 tubes. Size ranges from 120 cm. to 180 cm.

H. Violin (*tacuara*): Made of wood. Size ranges from 40 cm. to 50 cm.

### IV. COLONIAL AND REPUBLICAN TEXTILES (A.D. 1533-1900)

Textiles woven by indigenous peoples for ceremonial or ritual use:

#### A. Indigenous Highland Traditions:

1. Poncho (*balandran*, *ponchito*, *choni*, *khawa*, *challapata*): Square or rectangular overgarment worn by men usually consisting of two pieces of hand-woven cloth sewn together, with a slit in the center for the head. May be dyed with natural or synthetic dyes in all colors. Plain or striped. Often woven from alpaca or other camelid fibers. Some with tassels. Average size is 80 cm. x 100 cm.

2. Dress (*almilla/urku/aksu*): The *almilla* is the dress adopted by indigenous women in the sixteenth century tailored from hand-woven wool cloth (*bayeta*). It consists of a gathered skirt attached to a fitted bodice. The *urku* is a pleated or gathered skirt characterized by a bold

stripe pattern arranged horizontally. The *aksu* is a women's ceremonial dress woven from camelid fiber and constructed from a rectangular, two-piece cloth that is wrapped around the body and tied at the waist. May be dyed with natural or synthetic dyes in all colors. Average size is one square meter.

3. Mantle/shawl (*axsu, tsoc urjcu, tscoc irs, medio axsu, llacota, isallo, awayo, lllixlla, iscayo, phullu, talo unkhuña, ñañaqa*): Square or rectangular garment composed of two pieces of cloth sewn together. May be dyed with natural or synthetic dyes in all colors. Plain or striped. Often woven from alpaca or other camelid fibers. Designs are typically stripes arranged across the cloth in a vertical or horizontal pattern or confined to the margins of one side of the garment. Average size is one square meter.

4. Tunic (*unku, ira, ccahua*): Man's ceremonial vestment constructed from one piece of cloth which is folded in half and sewn up the sides, leaving openings for the arms at the top and an opening in the middle for the head. Designs are typically found in the hip, sleeve, and neck areas, but there are more elaborate examples where stripes cover the entire garment, some with silver thread. May be dyed with natural or synthetic dyes in all colors. Usually made from camelid wool, especially alpaca. Average size is 135 cm. x 92 cm.

5. Bag (*chuspa, alforja, kapachos, huayacas*): Carried by both men and women; woven from cotton or camelid fibers in a variety of widths, lengths, and colors. Found in either a solid color or simple polychrome stripe pattern arrangement with geometric motifs. These bags are usually square (20 cm.) or rectangular with a woven carrying strap. They often contain small pockets on the pouch exterior and are decorated with tassels.

6. Belt (*w'aka, tsayi, chumpi, wincha, t'isnu*): Worn by both men and women; woven from cotton or camelid fibers in a variety of widths, lengths, and colors. Found in either a solid color or simple polychrome geometric design.

7. Scarf/muffler: Worn by both men and women; woven from camelid fibers or sheep's wool with natural dyes in a variety of widths, lengths, and colors. Consists of one rectangular piece. Approximately 50 cm. in length.

8. Hat: Caps (10 square cm.) worn by men and *ñañacas* worn by women that range in size between 10 square cm. and one square meter. Both are woven from camelid fibers and silk, and dyed with natural pigments in red, blue, green, orange, yellow, tan, brown, black, purple, or a combination of colors. When present, designs are geometric or depict highly stylized animals such as llama and other camelids.

9. Sling (*wichi wichis, qorawas*): Rectangular band of cloth (25 cm. x 10 cm.); long ends taper to a loop where ropes are attached to either side.

10. Cloth: Square, rectangular, or fragmentary cloth woven from fine camelid fibers, silk, and/or silver and gold threads, or constructed from soft tree bark or other natural fiber, and dyed with natural pigments in

red, blue, green, orange, yellow, tan, brown, black, purple, or combination of colors. Some examples are striped in a vertical or horizontal pattern. Average size ranges between six square centimeters and six square meters. Cloth may be fragmentary, folded flat, or bundled (*q'epi*) for use in ritual ceremonies. Woman's ritual cloth, called *icuña*, *tari*, or *ñañaca*, is also included in this category.

B. Indigenous Lowland Traditions (A.D. 1533–1900):

1. Long shirt (*camijeta/tipois*): Tunic-like vestment made of cotton or vegetal material such as bark. Tassels often attached to lower edge. Size is 133 cm. long x 71 cm. wide.

2. Woman's Two Piece Vestment (*tsotomo* and *noca*): Long, straight skirt (*noca*) and separate bodice (*tsotomo*) made of cotton or vegetal material such as bark. Noca size is 50 cm. long x 40 cm. wide; *Tsotomo* size is 11.5 cm. deep x 35 cm. long.

3. Cloth: Square, rectangular, or fragmentary cloth woven from cotton, or constructed from soft tree bark or other natural fiber, and dyed with natural pigments in red, blue, green, orange, yellow, tan, brown, black, purple, or combination of colors. Some examples are striped in a vertical or horizontal pattern. Average size ranges between six square centimeters and six square meters. Cloth may be fragmentary, folded flat, or bundled (*q'epi*) for use in ritual ceremonies.

V. COLONIAL AND REPUBLICAN FEATHERWORK (A.D. 1533–1900)

Featherwork produced for ceremonial use consists of colorful, tropical feathers attached to leather, cloth, wood, or other material, such as basketry, to create adornments worn on the wrists, ankles, neck, waist, back, and head, including the lips and ears. Most typically found are headdresses, which may consist of small, modest crowns (30 cm. average) or large, towering bonnets of Suri feathers (80 cm.). This category also includes feather-covered ritual belts and textiles (35–70 cm.), fans (250 cm. long), staves or batons (145–250 cm.), basketry supports, and healer's amulets or *photadi* (80–250 cm.).

VI. COLONIAL AND REPUBLICAN CERAMICS (A.D. 1533–1900)

A. Ceremonial drinking vessels (*recipiente*, *andavete*, *trampavaso*): Containers and serving vessels used in the ceremonial context of chicha drinking. In post-Columbian times, these are hard ceramics with glassy surfaces resulting from the application of a mineral glaze. May be brown, green, blue, red, or any combination of colors. Vary in size and shape from handled jars, pitchers, cups, and vases, to animal-shapes (bull, tiger, llama, hoof).

B. Ritual smoking pipes: Tubular shape without tobacco bowl. The average size is from 10 cm. to 15 cm.

VII. COLONIAL AND REPUBLICAN RELIGIOUS ART (A.D. 1533–1900)

A. Statues: Made of wood, maguey, gesso, silver, gold, bronze, alabaster, or other stone and often decorated with gilt paint. Typical statuary for this period includes depictions of patron saints (*santos/santas*), angels, Christ, the Virgin Mary, the apostles, and the Holy Family. Gold and

silver crowns and other adornments in precious metals and precious stone are often found on these statues. Some are dressed with brocade and tapestry cloth made from gold and silver threads. Some are holding objects such as swords. Size varies from 30 cm. to two meters.

B. Crucifixes: Made of wood, maguey, alabaster, silver, gold, bronze, brass. Size varies from 5 cm. to 200 cm.

C. Oil paintings: Include depictions of patron saints (*santos/santas*), angels, Christ, the Virgin Mary, the apostles, and the Holy Family on wood, metal, canvas (*lienzo*), and other cloth. With or without frame. The archangel is a central theme. Oil painting is found on objects as small as reliquaries (3 cm.), mid-sized canvas (one square meter), or wall-sized renditions.

D. Reliquaries: Include painted and engraved depictions of patron saints (*santos/santas*), angels, Christ, the Virgin Mary, the apostles, and the Holy Family primarily on wood, ceramic, and metal such as silver. Bolivian reliquaries are essentially small lockets and do not always contain relics. Size ranges from 3 cm. to 25 cm.

E. Trunks/coffers (*petaca*): Made of leather and gilded wood or of silver. These small boxes (30 cm. length) or large trunks (1.5 meters in length) held altar objects, such as chalices and holy oil, during transport.

F. *Retablo*: Made of wood and precious metals such as gold or silver. These are altars or architectural wall facades behind existing altars that contain niches and a tabernacle. Often disassembled in pieces. May be as large as 20 meters high x 7 meters wide; portions vary—a niche may be one square meter. Small, self-contained units that appear as boxes with hinged doors are as small as 40 cm. in height. Miniatures average 5 cm. in height.

G. Altar pieces: Altars and their components (for example, frontal, grates, sacristy) made of gilded wood, gold, or silver. Often decorated in repousse. Average size is 1.6 meters x 1.2 meters.

H. Altar objects: These include chalices, monstrances/ostensoria, cruets, candelabras, lecterns, incense burners, hand bells typically made of gold and silver and decorated with precious stones, shell such as pearl, or other adornments. Size varies according to object. This category also includes ceramic, metal, and wooden *challadores* and ceremonial drinking cups.

I. Church furniture: Made of wood, silver gold, stone, brass, or bronze. Includes carved picture frames, confessionals, pulpits, pedestals, litters, choir stalls, chancels, banisters, lectern, saint's flags, and church bells and chimes. Size varies according to object.

J. Crowns and radiations: Made of silver and gold, these objects are found alone or in conjunction with religious statuary depicting the Virgin and Jesus. Size varies from 10 cm. to 30 cm.

K. Garment pin (*tupu/prendedor*): Made of copper, bronze, brass, silver, gold, or tumbaga. A large pin with a long shaft (15 cm.) that usually terminates with flat, discoid head (4 cm.), often embossed with design. Some heads are inlaid with semi-precious stone.

L. Liturgical vestments: Garments worn by the priest and/or other religious dignitaries made of fine cotton, silk, and gold and silver thread. This category includes the chasuble, dalmatic, alb, stole, girdle, manipule, rochet, musette, mitre, and bonnet. Size varies according to garment.

#### INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE

Because the amendments to the Customs Regulations contained in this document merely remove reference to expired import restrictions and impose import restrictions on the above-listed cultural property of Bolivia in response to a bilateral agreement entered into in furtherance of a foreign affairs function of the United States, pursuant to the Administrative Procedure Act (5 U.S.C. 553(a)(1)), no notice of proposed rulemaking or public procedure is necessary and a delayed effective date is not required.

#### REGULATORY FLEXIBILITY ACT

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. Accordingly, this final rule is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

#### EXECUTIVE ORDER 12866

This amendment does not meet the criteria of a "significant regulatory action" as described in E.O. 12866.

#### DRAFTING INFORMATION

The principal author of this document was Bill Conrad, Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

#### LIST OF SUBJECTS IN 19 CFR PART 12

Customs duties and inspections, Imports, Cultural property.

#### AMENDMENT TO THE REGULATIONS

Accordingly, Part 12 of the Customs Regulations (19 CFR Part 12) is amended as set forth below:

#### PART 12—[AMENDED]

1. The general authority and specific authority citations for Part 12, in part, continue to read as follows:

**Authority:** 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General Note 22, Harmonized Tariff Schedule of the United States (HTSUS)), 1624;

\* \* \* \* \*

Sections 12.104 through 12.104i also issued under 19 U.S.C. 2612;

\* \* \* \* \*

2. In § 12.104g, paragraph (a), the list of agreements imposing import restrictions on described articles of cultural property of State Parties, is

amended by adding Bolivia in appropriate alphabetical order, as follows, and paragraph (b), the list of emergency actions imposing import restrictions, is amended by removing the entry for "Bolivia":

**§ 12.104g Specific items or categories designated by agreements or emergency actions.**

(a) \* \* \*

<i>State Party</i>			<i>Cultural Property</i>			<i>T.D. No.</i>
Bolivia .....			Archaeological and Ethnological Material from Bolivia			T.D. 01-86
*	*	*	*	*	*	*
*	*	*	*	*	*	*

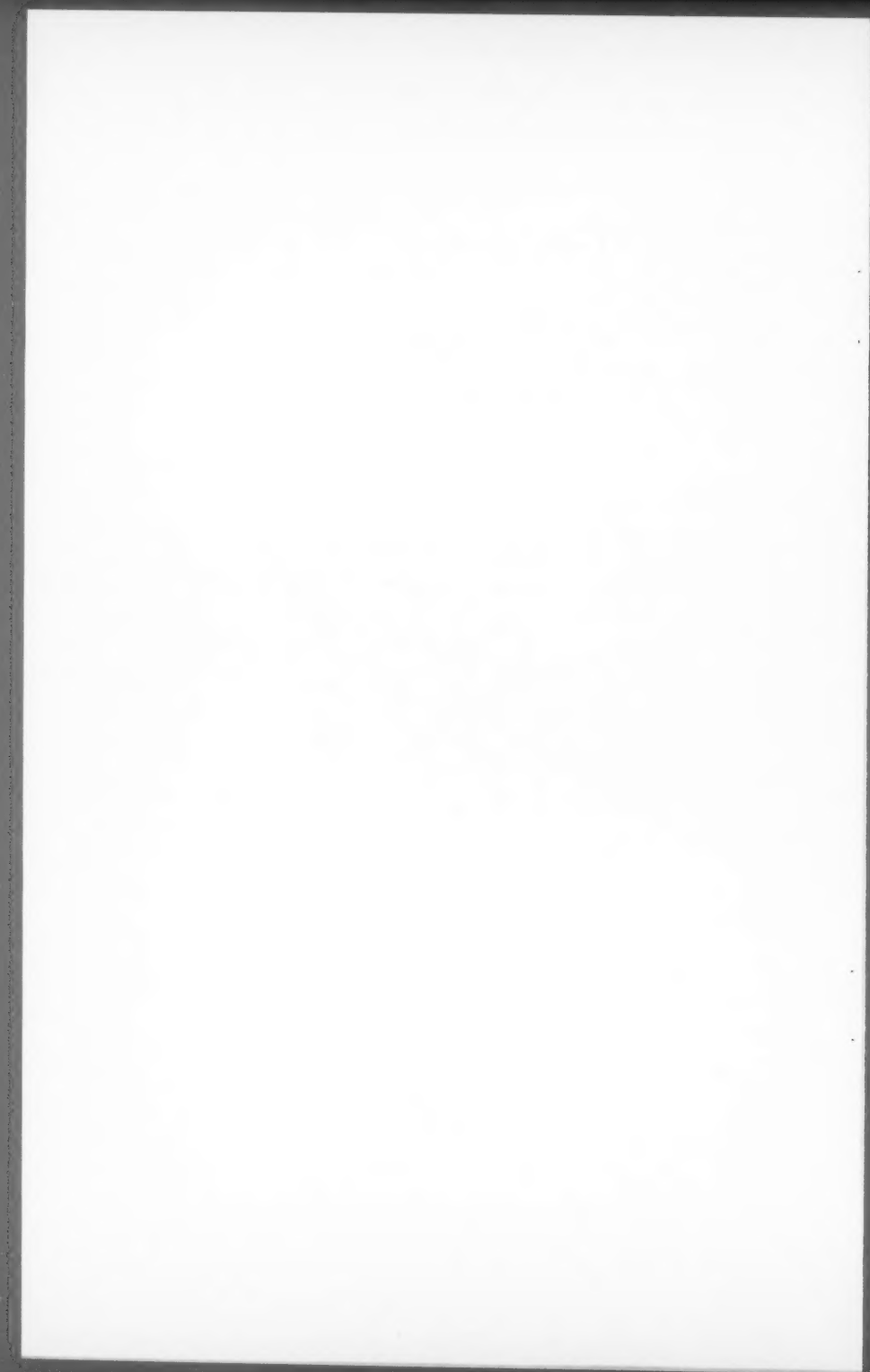
ROBERT C. BONNER,  
*Commissioner of Customs.*

Dated: December 4, 2001.

TIMOTHY E. SKUD,

*Acting Deputy Assistant Secretary of the Treasury.*

[Published in the Federal Register, December 7, 2001 (66 FR 63490)]



# U.S. Customs Service

## *General Notices*

### COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 10-2001)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of September 2001. The last notice was published in the CUSTOMS BULLETIN on October 10, 2001.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, 1300 Pennsylvania Avenue, N.W., Ronald Reagan Building, 3rd floor, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Joanne Roman Stump, Chief, Intellectual Property Rights Branch, (202) 927-2330.

Dated: November 28, 2001.

JOANNE ROMAN STUMP  
*Chief,*  
*Intellectual Property Rights Branch.*

The list of recordations follow:

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TMM OR MSK	OWNER NAME	RES
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10/08/01			IPR RECORDATIONS ADDED IN SEPTEMBER 2001		
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TMK0100407	20010919	20091031	SURVIVOR SERIES	TITAN SPORTS, INC.	N
TMK0100408	20010919	20091107	WORLD WRESTLING FEDERATION	TITAN SPORTS, INC.	N
TMK0100409	20010919	20011214	AUSTIN 3:16	TITAN SPORTS, INC.	N
TMK0100410	20010919	20020915	WRESTLEMANIA	TITAN SPORTS, INC.	N
TMK0100411	20010919	20020915	WRESTLEMANIA	TITAN SPORTS, INC.	N
TMK0100412	20010925	20100118	FINDIT	AMBITION IDEAS, INC.	N
TMK0100413	20010925	20021103	UNDERTAKER	TITAN SPORTS, INC.	N
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TMK0100415	20010925	20030502	THE UNDERTAKER	TITAN SPORTS, INC.	N
TMK0100416	20010925	20030518	UNDERTAKER	TITAN SPORTS, INC.	N
TMK0100417	20010925	20041101	SURVIVOR SERIES	TITAN SPORTS, INC.	N
TMK0100418	20010925	20041102	WRESTLEMANIA	TITAN SPORTS, INC.	N
TMK0100419	20010925	20050321	SOA JUMBLE	TITAN SPORTS, INC.	N
TMK0100420	20010925	20050321	SUMMERBES	TITAN SPORTS, INC.	N
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TMK0100422	20010925	20080127	WHF IS WAR	TITAN SPORTS, INC.	N
TMK0100423	20010925	20090202	RAW (STYLIZED)	TITAN SPORTS, INC.	N
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TMK0100425	20010925	20090921	WHF ATTITUDE	TITAN SPORTS, INC.	N
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TMK0100428	20010925	20091214	AUSTIN 3:16	TITAN SPORTS, INC.	N
TMK0100429	20010925	20101024	RAW	TITAN SPORTS, INC.	N
TMK0100430	20010925	20101024	RAW	TITAN SPORTS, INC.	N
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TMK0100432	20010927	20061022	ARMANI	GA HODEFINE S.A.	N
TMK0100433	20010927	20090727	PAMELA COLMAN SMITH	U.S. GAMES SYSTEMS, INC.	N
TMK0100434	20010927	20090727	UNIVERSAL	U.S. GAMES SYSTEMS, INC.	N
TMK0100435	20010927	20110514	THE RIDER TAROT DECK	U.S. GAMES SYSTEMS, INC.	N
TMK0100436	20010927	20050530	ALBANO-MAITE	U.S. GAMES SYSTEMS, INC.	N
TMK0100437	20010927	20081117	PAT CHUN (CHINESE CHARACTERS)	PAT CHUN INTERNATIONAL, LTD.	N
TMK0100438	20010927	20070415	PAT CHUN	PAT CHUN INTERNATIONAL, LTD.	N
TMK0100439	20010927	20070415	PAT CHUN	PAT CHUN INTERNATIONAL, LTD.	N
TMK0100440	20010928	20050425	PROACTIV	GUTHY-RENKER CORPORATION	N
TMK0100441	20010928	20050718	GUTHY-RENKER	GUTHY-RENKER CORPORATION	N
TMK0100442	20010928	20090720	MISCELLANEOUS DESIGN(RHINO I)	YAKIRA, L.L.C.	N
TMK0100443	20010928	20080721	TOTAL GYM PLUS DESIGN	ENGINEERING FITNESS, INC.	N
TMK0100444	20010928	20080721	PINK LADY	ENGINEERING FITNESS, INC.	N
TMK0100445	20010928	20101024	PINK LADY	BRANDT'S FRUIT TREES, INC.	N
SUBTOTAL RECORDATION TYPE 41					
TOTAL RECORDATIONS ADDED THIS MONTH 42					

COPYRIGHT, TRADEMARK, AND  
TRADE NAME RECORDATIONS

(No. 11-2001)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of November 2001. The last notice was published in the CUSTOMS BULLETIN on October 10, 2001.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, 1300 Pennsylvania Avenue, N.W., Ronald Reagan Building, 3rd floor, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Joanne Roman Stump, Chief, Intellectual Property Rights Branch, (202) 927-2330.

Dated: November 28, 2001.

JOANNE ROMAN STUMP

*Chief,*

*Intellectual Property Rights Branch.*

The list of recordations follow:



11/01/01  
07:50:07

U.S. CUSTOMS SERVICE  
IPR RECORDATIONS ADDED IN OCTOBER 2001

PAGE 2  
DETAIL

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TKM0100482	20011012	20110925	WHITE HORSE	WHITE HORSE COMPANY, S.A.	N
TKM0100483	20011012	20110927	BMW	BMW GOLF COMPANY	N
TKM0100484	20011012	20111211	BMW	BAYERISCHE MOTOREN WERKE AKTIENG	N
TKM0100485	20011012	20090227	RULE 35	CALLAWAY GOLF COMPANY	N
TKM0100486	20011012	20110527	RULE 35 & DESIGN	CALLAWAY GOLF COMPANY COMMITTEE	N
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TKM0100489	20011016	20090216	MCCORMICK	MCCORMICK DELAWARE, INC.	N
TKM0100491	20011016	20090216	GENEVE ELEGANTE	FINE WATCHES, INC.	N
TKM0100492	20011016	20110306	ASTROGLIDE	DAN X. WRAY (ONS) PTY LTD.	N
TKM0100493	20011017	20040911	ASTROGLIDE	DAN X. WRAY (ONS) PTY LTD.	N
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TKM0100498	20011018	20100717	CIRCULAR LOGO	FOUNTAIN POWERBOATS INC.	N
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TKM0100501	20011018	20110716	HELIOPLAN	HELIOPLAN LICHTFILTER-TECHNIK	N
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TMK0100534	SINUTAB	WARNER-LAMBERT COMPANY	N
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TMK0100537	20011030 20100515	ALLIED DOMECQ INT'L HOLDINGS BV	N
TMK0100538	20011030 20100215	ALLIED DOMECQ INT'L HOLDINGS BV	N
TMK0100539	20011030 20100411	ALLIED DOMECQ INT'L HOLDINGS BV	N
TMK0100540	20011030 20100411	ALLIED DOMECQ INT'L HOLDINGS BV	N
SUBTOTAL RECORDATION TYPE		90	
TOTAL RECORDATIONS ADDED THIS MONTH		102	

DEPARTMENT OF THE TREASURY,  
OFFICE OF THE COMMISSIONER OF CUSTOMS,  
*Washington, DC, December 5, 2001.*

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

DOUGLAS M. BROWNING,  
*Acting Assistant Commissioner,  
Office of Regulations and Rulings.*

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REVOCATION OF RULING LETTER AND TREATMENT  
RELATING TO TARIFF CLASSIFICATION OF CERTAIN  
TEXTILE TIE BACKS

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter and treatment relating to the classification of certain textile tie backs (curtain tiebacks).

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling letter relating to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of certain textile curtain tiebacks. Similarly, Customs is also revoking any treatment previously accorded by it to substantially identical merchandise. Notice of the proposed actions was published October 17, 2001, in the CUSTOMS BULLETIN, Vol. 35, No. 42. No comments were received in response to the notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after February 18, 2002.

FOR FURTHER INFORMATION CONTACT: Timothy T. Dodd, Textile Classification Branch: (202) 927-1735.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L.

103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published in the October 17, 2001, CUSTOMS BULLETIN, Vol. 35, No. 42, proposing to revoke NYRL H81076 (May 24, 2001) relating to the tariff classification of certain textile curtain tiebacks, and to revoke any treatment accorded to substantially identical transactions. The period to submit comments expired on November 16, 2001. No comments were received.

In New York Ruling Letter (NYRL) H81076, dated May 24, 2001, the Customs Service classified certain textile curtain tiebacks under subheading 6307.90.9989, HTSUSA, which covers other made up articles.

It is now Customs position that the proper classification for the textile curtain tiebacks is subheading 6304.93.0000, HTSUSA, as other furnishing articles of synthetic materials. Headquarters Ruling Letter (HQ) 965219 revoking NYRL H81076 is set forth in the Attachment to this document.

Although in this notice Customs specifically refers to one New York Ruling Letter, this revocation will cover any rulings on this merchandise that may exist but have not been specifically identified. Any party who has received an interpretative ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised Customs during the comment period.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking NYRL H81076, and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in HQ 965219, *supra*. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical merchandise.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: November 28, 2001.

JOHN ELKINS,  
(for John Durant, Director,  
Commercial Rulings Division.)

[Attachment]

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[ATTACHMENT]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE,  
Washington, DC, November 28, 2001.

CLA-2 RR:CR:TE 965219 ttd  
Category: Classification  
Tariff No. 6304.93.0000

MR. LANCE SLOVES  
J.C. PENNEY PURCHASING CORPORATION, INC.  
6501 Legacy Drive  
Plano, TX 75024-3698

Re: Reconsideration of New York ruling letter H81076, dated May 24, 2001.

DEAR MR. SLOVES:

This letter is pursuant to Customs Headquarters' reconsideration of New York Ruling Letter (NYRL) H81076, dated May 24, 2001, regarding classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of certain textile curtain tiebacks. After review of that ruling, Headquarters has determined that the classification of the curtain tiebacks in subheading 6307.90.9989, HTSUSA, was incorrect. For the reasons that follow, this ruling revokes NYRL H81076.

Pursuant to section 625(c)(1) Tariff Act of 1930 (19 U.S.C. 1625(c)(1)) as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-82, 107 Stat. 2057, 2186), notice of the proposed revocation of NYRL H81076 was published on October 17, 2001, in the CUSTOMS BULLETIN, Volume 35, Number 42. As explained in the notice, the period within which to submit comments on this proposal was until November 16, 2001. No comments were received in response to this notice.

*Facts:*

The articles at issue are "Textile Tie Backs" (tiebacks), used to secure curtains to the side of a window and made from 100 percent polyester woven fabric panels, item numbers 742-0920 and 742-0797. Each panel is folded lengthwise and sewn closed on all sides. Each item measures approximately 2 x 11 inches and has hook and loop tapes sewn to the ends.

*Issue:*

Whether the subject items are classifiable under heading 6304, HTSUSA, which provides for other furnishing articles or under heading 6307, HTSUSA, which provides for other made up articles.

*Law and Analysis:*

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides, in part, that classification decisions are to be "determined according to the terms of the headings and any relative section or chapter notes." In

the event that goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied in their sequential order.

The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the official interpretation of the Harmonized System at the international level (for the 4 digit headings and the 6 digit subheadings) and facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI. While neither legally binding nor dispositive of classification issues, the EN provide commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings. See T.D. 89-80, 54 Fed. Reg. 35127-28 (Aug. 23, 1989); *Lonza, Inc. v. United States*, 46 F.3d 1098, 1109 (Fed. Cir. 1995).

The headings under consideration are heading 6304, HTSUSA, which covers *inter alia*, other furnishing articles and heading 6307, HTSUSA, which covers other made up textile articles.

Although heading 6303, HTSUSA, provides for curtains, it does not provide for parts and accessories for curtains, and thus, the tiebacks are not classifiable in heading 6303. Heading 6304, HTSUSA, provides for other furnishing articles, excluding those of heading 9404, HTSUSA. Heading 9404 covers articles of bedding, which the instant articles clearly are not. The EN to heading 6304 provide that the heading covers furnishing articles of textile materials. Moreover, the EN expressly name curtain loops among those articles listed as exemplars for heading 6304, HTSUSA. While the term "curtain loop" is not defined in the tariff or the EN, The Random House Webster's Unabridged Dictionary, (2001), defines a "tieback" as "a strip or loop of material, heavy braid, or the like, used for holding a curtain back to one side." The Merriam Webster Online: Collegiate Dictionary, (2000), defines the term "tieback" as "a decorative strip or device of cloth, cord, or metal for draping a curtain to the side of a window."

The subject tiebacks are made of woven fabric and clearly not metal nor plaited (and do not have tassels) like cord tiebacks. Rather, the curtain tiebacks at issue are the same as the curtain loops referenced in the EN to heading 6304. Each of the instant tiebacks is a strip of material made of woven fabric, which forms a loop when fastened together by hook and loop tapes sewn to the ends. The resulting loop then functions to hold curtains in place like a "curtain loop." Accordingly, the subject tiebacks are a textile furnishing within the scope of heading 6304, HTSUSA, as supported in the EN. Moreover, Customs has consistently ruled that curtain tiebacks like the subject tiebacks (a fabric strip with hook and loop closures at each end) are the type classifiable under heading 6304, HTSUSA. See Headquarters Ruling Letter (HQ) 083275, dated December 12, 1989; HQ 084889, dated February 21, 1990; HQ 084893, dated April 4, 1990; HQ 084900, dated June 4, 1990; and HQ 085050, dated June 4, 1990.

Heading 6307, HTSUSA, provides for other made up articles of textile materials. The EN to heading 6307 state that the heading covers made up articles of any textile material which are not included more specifically elsewhere in the tariff schedule. The items under consideration are more specifically provided for elsewhere in heading 6304, HTSUSA, and therefore are not properly classifiable under heading 6307, HTSUSA.

As the subject curtain tiebacks are made entirely of polyester, they are classifiable under subheading 6304.93.0000, HTSUSA, which provides for other furnishing articles, excluding those of heading 9404, not knitted or crocheted, of synthetic fibers.

#### *Holding:*

Based on the foregoing, the subject merchandise is classified in subheading 6304.93.0000, HTSUSA, which provides for other furnishings articles, excluding those of heading 9404: other: not knitted or crocheted, of synthetic fibers. The applicable rate of duty is 9.7 percent ad valorem and the textile restraint category is 666.

NYRL H81076, dated May 24, 2001, is hereby REVOKED. In accordance with 19 U.S.C. §1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at your local Customs office. The *Status Re-*

port on *Current Import Quotas (Restraint Levels)* is also available on the Customs Electronic Bulletin Board (CEBB) which can be found on the U.S. Customs Service Website at [www.customs.gov](http://www.customs.gov).

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

JOHN ELKINS,  
(for John Durant, Director,  
Commercial Rulings Division.)

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#### REVOCATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF CERTAIN GARMENTS MADE OF PLASTIC WITH REINFORCING TEXTILE MATERIAL

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter and revocation of treatment relating to the classification of certain garments made of plastic.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, 19 U.S.C. 1625(c), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking one ruling relating to the tariff classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of certain garments made of plastic in which textile fabric is present merely to reinforce the plastic. Customs is also revoking any treatment previously accorded by it to substantially identical merchandise.

Notice of the proposed action was published in the CUSTOMS BULLETIN, Volume 35, Number 42, on October 17, 2001. The Customs Service received no comments during the notice and comment period that closed on November 16, 2001. Customs, as the result of the disruption of mail service, waited two additional weeks until November 30, 2001 before proceeding with this reconsideration and revocation. No comments postmarked either before or after the close of the comment period were received.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after February 18, 2002.

FOR FURTHER INFORMATION CONTACT: J. Steven Jarreau, Textile Classification Branch: (202) 927-2518.

## SUPPLEMENTARY INFORMATION:

## BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, 19 U.S.C. §1484, the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, 19 U.S.C. 1625(c)(1), as amended by section 623 of Title VI, a notice was published in the CUSTOMS BULLETIN Volume 35, Number 42, on October 17, 2001, proposing to revoke New York Ruling Letter F83735 (Mar. 20, 2000) relating to the tariff classification of certain garments made of plastic in which textile fabric is present merely to reinforce the plastic and to revoke any treatment accorded to substantially identical transactions.

The Customs Service received no comments during the notice and comment period that closed on November 16, 2001. Customs, as the result of the disruption of mail service, waited two additional weeks until November 30, 2001 before issuing this reconsideration and revocation. No comments postmarked either before or after the close of the comment period were received.

The Customs Service in NY F83735 (Mar. 20, 2000) classified certain garments in subheading 6113.00.1005, HTSUSA, as being garments of knitted fabric that had an outer surface impregnated, coated, covered or laminated with a plastic material that completely obscured the underlying fabric.

It is now Customs position that the garments are properly classified in subheading 3926.20.9050, HTSUSA, because the garments are composed of a cellular plastic and the knitted textile fabric backing is present merely for reinforcing purposes.

Although in this notice Customs is specifically refers to one New York Ruling Letter (NY), this notice will cover any rulings on this merchandise that may exist, but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rul-

ings in addition to those identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, which classified the merchandise contrary to this notice, should have advised Customs during this comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, 19 U.S.C. 1625(c)(2), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical merchandise. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importation of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUSA. Any person involved in substantially identical transactions should have advised Customs during the comment period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling not identified in this notice, may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importation of merchandise subsequent to the effective date of this final notice.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking NY F83735 and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed HQ 964385. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical merchandise.

This ruling will become effective, in accordance with 19 U.S.C. 1625(c), sixty (60) days after publication in the CUSTOMS BULLETIN.

Dated: December 3, 2001.

JOHN ELKINS,  
(for John Durant, Director,  
Commercial Rulings Division.)

[Attachment]

## [ATTACHMENT]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE,  
Washington, DC, December 3, 2001.

CLA-2 RR:CR:TE 964385 jsj  
Category: Classification  
Tariff No. 3926.20.9050

MR. SAMUAL J. ATTIAS  
S.A.S.C.O. TRADING, INC.  
1359 Broadway  
Suite 1808  
New York, NY 10018

Re: Reconsideration of NY F83735; Subheading 3926.20.9050, HTSUSA; "Of Plastic" and "Of Fabric"; Textile Fabric Merely Reinforcing Plastic; Style Numbers: M30033, Y30333 and B30533.

DEAR MR. ATTIAS:

The purpose of this correspondence is to respond to a request of the National Commodity Specialist Division of the Customs Service to reconsider New York Ruling Letter F83735. New York ruling letter F83735 was issued to S.A.S.C.O. Trading, Inc. on March 20, 2000. The articles in issue in NY F83735 were long-sleeve jackets style numbers M30033, Y30333 and B30533.

Pursuant to section 625 (c), Tariff Act of 1930, as amended, 19 U.S.C. 1625 (c), notice of the proposed revocation of NY F83735 was published on October 17, 2001, in the CUSTOMS BULLETIN, Volume 35, Number 42. The Customs Service received no comments during the notice and comment period that closed on November 16, 2001. Customs, as the result of the disruption of mail service, waited two additional weeks until November 30, 2001 before issuing this reconsideration and revocation. No comments postmarked either before or after the close of the comment period were received.

This reconsideration and revocation is being issued subsequent to a review of the following: (1) NY F83735 (Mar. 20, 2000); (2) Customs Service laboratory report number: 2-2000-10588; (3) Correspondence of S.A.S.C.O. Trading, Inc. dated May 31, 2000; and (4) A sample identified with style numbers: M30033, Y30333 and B30533.

The Customs Service subsequent to reconsidering NY F83735 is revoking that ruling letter pursuant to the following analysis.

#### *Facts*

Garment style M30033 is a long sleeve jacket with a quilted lining that falls below the waist of the wearer. A Customs laboratory report establishes that it is "composed knit fabrics which have been coated, covered or laminated on one surface with a polyvinyl chloride type of cellular plastics material."

The jacket features a pointed collar and a full front zipper closure. The sleeve cuffs tighten through the use of a section of material that wraps over the wrist of the wearer and secures to the sleeve by means of a hook and loop fastener system.

The jacket features two slash pockets, one on each side of the garment below the waistline and a left breast zipper pocket. The breast pocket has a storm flap, but neither the slash pockets nor the front zipper closure have storm flaps. A small metal plate with the phrase "BRAVE ELTEND" is attached to the jacket immediately below the breast pocket.

S.A.S.C.O. Trading advises the Customs Service that, in addition to style M30033, it will import garments of identical material composition, but in different sizes, in styles Y30333 and B30533.

The Customs Service is advised that the country of origin of the garments is China.

#### *Issue:*

What is the classification, pursuant to the Harmonized Tariff Schedule of the United States Annotated, of the above-described garments identified as style M30033, Y30333 and B30533?

#### *Law and Analysis:*

The United States Customs Service issued New York Ruling Letter F83735 on March 20, 2000, classifying men's style M30033, big boy's style Y30333 and little boy's style

B30533 in subheading 6113.00.1005, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). S.A.S.C.O. Trading subsequently contacted Customs by telephone and correspondence, and advised Customs that the garments in issue were constructed of the same material as the garments addressed in NY F83736 (Mar. 20, 2000). New York Ruling Letter F83736 classified styles M30013, Y30319 and B30513 in subheading 3926.20.9050, HTSUSA. The National Commodity Specialist Division, subsequent to receipt of S.A.S.C.O.'s additional inquiry, a sample garment of the material of styles M30033, Y30333 and B30533, and a Customs laboratory report, forwarded a request to Customs Headquarters seeking reconsideration of NY F83736.

The responsibility for initially interpreting and applying the Harmonized Tariff Schedule of the United States Annotated rests with the U.S. Customs Service.<sup>1</sup> The Customs Service, in accordance with its legislative mandate, classifies imported merchandise pursuant to the General Rules of Interpretation (GRI) and the Additional U.S. Rules of Interpretation.<sup>2</sup>

General Rule of Interpretation 1 provides, in part, that classification decisions are to be "determined according to the terms of the headings and any relative section or chapter notes." *General Rule of Interpretation 1*. General Rule of Interpretation 1 further provides that merchandise which can not be classified in accordance with the dictates of GRI 1 should be classified pursuant to the other General Rules of Interpretation. See *General Rule of Interpretation 1*.

Commencing classification of the garments style numbers M30033, Y30333 and B30533 in accordance with the dictates of GRI 1, the Customs Service examined the headings of the HTSUSA. The initial issue to be resolved in classifying these garments at the heading level is to determine whether they are properly classified as articles "of knitted \* \* \* fabrics" in heading 6113, HTSUSA, or articles "of plastics" in heading 3926, HTSUSA.

Customs specifically notes that the analysis at this stage of classifying the garments is analysis pursuant to GRI 1. The focus is on the terms of the headings and the section and chapter notes. Classification of the garments as being either "of knitted \* \* \* fabrics" in heading 6113, HTSUSA, or "of plastics" in heading 3926, HTSUSA, will preclude classification in the other. Customs has not resorted to GRI 3 because the garments are either "of knitted \* \* \* fabrics" or "of plastics" and, therefore, are not *prima facie* classifiable under two or more headings. See *General Rule of Interpretation 3*.

Heading 6113, HTSUSA, provides for "[g]arments, made up of knitted or crocheted fabrics of heading 5903, 5906 or 5907." Heading 5903, HTSUSA, provides for the classification of "[t]extile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902<sup>3</sup>." The garments under consideration are composed of a one hundred percent man-made knitted fabric that has been coated, covered or laminated on the exterior surface with a polyvinyl chloride cellular plastic.

A review of the Chapter Notes to Chapter 59 further addresses the question of whether the jackets are properly classified in heading 6113, HTSUSA. Chapter 59, Note 2 states that heading 5903, HTSUSA, applies to "[t]extile fabrics, impregnated, coated, covered or laminated with plastics, whatever the weight per square meter and whatever the nature of the plastic material (compact or cellular)." *Chapter 59, Note 2 (a), HTSUSA*. Chapter 59 Note 2 (a) does, however, state exceptions to the general principle.

The Chapter Notes to Chapter 59 announce six exceptions to the general principle that heading 5903, HTSUSA, applies to textile fabrics, impregnated, coated, covered or laminated with plastics. The exception of relevance to the instant legal analysis is exception five. Chapter 59 Note 2 (a) (5) provides that "[p]lates, sheets or strip of cellular plastics, combined with textile fabric, where the textile fabric is present merely for reinforcing purposes" are properly classified in Chapter 39 rather than Chapter 59. (Emphasis added) *Chapter 59, Note 2 (a) (5), HTSUSA*.

The garments under consideration, as previously stated, are composed of cellular plastic. Since the plastic is cellular, the issue that must be resolved is whether the knitted textile fabric is present merely for reinforcing purposes.

<sup>1</sup> See Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 100-576, at 549 (1988) reprinted in 1988 U.S. Code Cong. and Adm. News 1547, 1582.

<sup>2</sup> See 19 U.S.C. 1202 (West 1999); See generally, *What Every Member of The Trade Community Should Know About: Tariff Classification*, an Informed Compliance Publication of the Customs Service available on the World Wide Web site of the Customs Service at [www.customs.gov](http://www.customs.gov), search "Importing & Exporting" and then "U.S. Customs Informed Compliance Publications."

<sup>3</sup> Heading 5902, HTSUSA, addresses tire cord fabric of high tenacity yarn.

It is the conclusion of the Customs Service that the textile fabric to which the plastic is coated, covered or laminated, is present merely to reinforce the plastic. The purpose of the fabric backing is to prevent the outer plastic shell from tearing or stretching. See HQ 085100 (Sept. 11, 1989). The textile fabric is not present for more than the purpose of reinforcing the plastic outer shell. Cf. HQ 086358 (June 19, 1991) (textile substrate provides comfort to the wearer of gloves and prevents trapping of perspiration); HQ 088207 (June 4, 1991) (textile component of candy box provides decorative and consumer appeal resulting in article being considered to be made of textile material rather than of plastics); See also *General Explanatory Notes, Chapter 39, Plastics and textile combinations* (providing that plastics and textile combinations are essentially governed by Note 1(h) to Section XI, Note 3 to Chapter 56 and Note 2 to Chapter 59, and that plates, sheets and strip of cellular plastics combined with textile fabric where the textile is present merely for reinforcing purposes are products covered by Chapter 39).

Application of the chapter notes to Chapter 59, applied though the analysis of heading 6113, HTSUSA, instructs Customs that the garments are considered to be "of plastic" rather than being "of knitted \* \* \* fabrics." The garments are, therefore, properly classified in Chapter 39, HTSUSA. The heading, pursuant to GRI 1, that provides for the classification of the merchandise is heading 3926, HTSUSA.

Having concluded that the garments are properly classified in heading 3926, HTSUSA, as being "of plastic," the correct subheading remains to be determined. The Customs Service, pursuant to General Rule of Interpretation 6, will apply GRI 1 to the subheading levels of heading 3926, HTSUSA. General Rule of Interpretation 6 provides for the application of GRI 1 through GRI 5 for the purpose of determining the correct subheading of a heading when comparing subheadings at the same level. See *General Rule of Interpretation 6, HTSUS*.

Applying GRI 1 at the subheading levels pursuant to GRI 6, the garments in issue are classified in subheading 3926.20.9050, HTSUSA. Subheading 3926.20.9050, HTSUSA, provides:

3926	Other articles of plastics and articles of other materials of heading 3901 to 3914:
3926.20	Articles of apparel and clothing accessories (including gloves):
	Other:
3926.20.90	Other;
3926.20.9050	Other.

**Holding:**

New York Ruling Letter F83735 (Mar. 20, 2000) has been reconsidered and is hereby revoked.

The garments, style numbers M30033, Y30333 and B30533, are classified in subheading 3926.20.9050, Harmonized Tariff Schedule of the United States Annotated.

The General Column 1 Rate of Duty is five (5) percent, *ad valorem*.

This ruling, in accordance with 19 U.S.C. 1625 (c), will become effective sixty days (60) after its publication in the CUSTOMS BULLETIN.

JOHN ELKINS,  
(for John Durant, Director,  
Commercial Rulings Division.)

## REVOCATION AND MODIFICATION OF RULING LETTERS AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF KNEE BRACES AND SUPPORTS

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of modification and revocation of tariff classification ruling letters and treatment relating to the classification of knee braces and knee supports.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying HQ 086667, dated May 9, 1990; NY D88848, dated April 1, 1999; NY 862972, dated May 31, 1991; and revoking HQ 087552, dated October 1, 1990; and NY A89561, December 11, 1996, relating to the tariff classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of knee braces and knee supports. Similarly, Customs is revoking any treatment previously accorded by it to substantially identical merchandise that is contrary to the position set forth in this notice. Notice of the proposed revocation was published in the CUSTOMS BULLETIN of October 17, 2001, Vol. 35, No. 42. The Customs Service received no comments during the notice and comment period that closed on November 16, 2001. Customs, as the result of the disruption of mail service, waited two additional weeks until November 30, 2001 before proceeding with this reconsideration and revocation. No comments postmarked either before or after the close of the comment period were received.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after February 18, 2002.

FOR FURTHER INFORMATION CONTACT: Beth Safeer, Textiles Branch: (202) 927-1342.

### SUPPLEMENTARY INFORMATION:

#### BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public

with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to Customs obligations, notice proposing to modify HQ 086667, dated May 9, 1990; NY D88848, dated April 1, 1999; NY 862972, dated May 31, 1991; and to revoke HQ 087552, dated October 1, 1990 and NY A89561, dated December 11, 1996, was published on October 17, 2001, in Vol. 35, No. 42, of the CUSTOMS BULLETIN. No comments were received in response to this notice.

Customs previously classified a hinged knee support, a neoprene knee support and a knee brace under subheading 6212.90.0030, HTSUSA, which provides for brassieres, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted: other, of man-made fibers or man-made fibers and rubber or plastics. Customs also classified an ankle brace, a knee brace and knee immobilizer under subheading 9021.19.8500, HTSUSA, which provides artificial joints and other orthopedic or fracture appliances; parts and accessories thereof \* \* \* other. Based on our analysis of the scope of the terms of the heading in 9021, HTSUSA, 6307, HTSUSA, and 6212, HTSUSA, the Legal Notes, and the Explanatory Notes, the knee braces and supports of the type discussed herein, are classifiable in subheading 6307.90.9989, HTSUSA, which provides for "Other made up articles, including dress patterns: Other; Other: Other: Other: Other."

Pursuant to 19 U.S.C. 1625(c)(1), Customs is modifying HQ 086667, by the issuance of HQ 965235 (Attachment A); NY D88848, by the issuance of HQ 965237 (Attachment B); NY 862972, by the issuance of HQ 965234 (Attachment C); and is revoking HQ 087552, by the issuance of HQ 965236 (Attachment D), and NY A89561, by the issuance of HQ 965238 (Attachment E) and any other ruling not specifically identified, that is contrary to the position set forth in this notice, to reflect the proper classification of the merchandise pursuant to the analysis set forth in the proposed foregoing identified rulings. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions.

As stated in the proposed notice, this revocation will cover any rulings which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) contrary to the position set forth in this notice, should have advised Customs during the notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Cus-

toms is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective sixty (60) days after its publication in the CUSTOMS BULLETIN.

Dated: December 5, 2001.

JOHN ELKINS,  
(for John Durant, Director,  
Commercial Rulings Division.)

[Attachments]

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[ATTACHMENT A]

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE,

Washington, DC, December 5, 2001.

CLA-2 RR:CR:TE 965235 BAS

Category: Classification

Tariff No. 6307.90.9989

MR. STANLEY DREIER  
THE DREIER COMPANY  
375 Turnpike Road East  
East Brunswick, NJ 08816

Re: Modification of HQ 086667, May 9, 1990; Classification of a neoprene knee support.

DEAR MR. DREIER:

This is in reference to Headquarters Ruling Letter (HQ) 086667 issued to you on May 9, 1990, in response to your letter of March 8, 1990 to the U.S. Customs Service, Office of Regulations and Rulings, requesting reconsideration of NY Ruling Letter 841837, on the classification under the Harmonized Tariff Schedule of the United States (HTSUS) of a knee and thigh support and a waist/back support.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of HQ 086667, as described below, was published in the CUSTOMS BULLETIN, Volume 35, Number 42, on October 17, 2001. The Customs Service received no comments during the notice and comment period that closed on November 16, 2001. Customs, as the result of the disruption of mail service, waited two additional weeks until November 30,

2001 before proceeding with this reconsideration and modification. No comments postmarked either before or after the close of the comment period were received.

In HQ 086667, May 9, 1990, a neoprene knee support and a neoprene back/waist support were classified under subheading 6212.90.0030, HTSUSA, which provides for brassieres, girdles, corsets, braces, suspenders, garters, and similar articles and parts thereof, whether or not knitted or crocheted, other; of man-made fibers or man-made fibers and rubber or plastics. We have now had occasion to review that decision and found it to be in error insofar as the classification of the neoprene knee support is concerned. This ruling letter modifies HQ 086667, May 9, 1990 only insofar as it concerns the classification of the knee support.

*Facts:*

The merchandise under consideration consists of a knee support constructed of neoprene rubber laminated on both the inner and outer surfaces with knit nylon fabric. It is designed with an opening at the knee for patella support.

*Issue:*

Whether the neoprene knee support is properly classifiable in Heading 9021, HTSUSA, which provides for orthopedic appliances and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability, Heading 9506, HTSUSA, which provides for articles and equipment for general physical exercise and other sports, Heading 6212, HTSUSA, brassieres, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof or under heading 6307, HTSUSA, which provides for other made up textile articles?

*Law and Analysis:*

Classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the Headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the Headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The knee support is potentially classifiable in four HTSUSA headings. One possible heading is Heading 9021, HTSUSA, which provides for orthopedic appliances and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability. Other possible Headings for the merchandise include Heading 6212, HTSUSA, which provides for braces, Heading 9506, HTSUSA, which provides for articles and equipment for general physical exercise and other sports or Heading 6307, HTSUSA, which provides for other made up textile articles.

*Heading 9021, HTSUSA*

Heading 9021, HTSUSA, provides for "Orthopedic appliances, including crutches, surgical belts and trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability; parts and accessories thereof."

Note 1 (b) of Chapter 90 maintains:

This chapter does not cover supporting belts or other support articles of textile material, whose intended effect on the organ to be supported or held derives solely from their elasticity (for example, maternity belts, thoracic support bandages, abdominal support bandages, supports for joints or muscles (Section XI).

When interpreting and implementing the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, while neither legally binding nor dispositive, provide a guiding commentary on the scope of each Heading, and are generally indicative of the proper interpretation of the HTSUS. Customs believes the ENs should always be consulted. See T.D. 89-90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The ENs to Heading 9021 state that:

This Heading **does not include** supporting belts or other support articles of the kind referred to in Note 1 (b) to this Chapter, \* \* \* (generally Heading 62.12 or 63.07).

The neoprene knee support at issue depends on elasticity to support the joints and therefore, would be excluded from classification in Heading 9021 on the basis of Note 1 (b) of Chapter 90.

### Heading 9506

Having precluded classification in Heading 9021, HTSUSA, we must determine whether classification in Heading 9506, HTSUSA is appropriate. Heading 9506, HTSUSA provides for, *inter alia*, articles and equipment for gymnastics, athletics, other sports and outdoor games

The ENs to Heading 9506 state in pertinent part:

This heading covers:

\* \* \* \* \*

(B) Requisites for other sports and outdoor games (other than toys presented in sets, or separately of Heading 95.03), e.g.:

\* \* \* \* \*

(13) Protective equipment for sports or games, e.g., fencing masks and breast plates, elbow and knee pads, cricket pads, shin-guards.

The sports protective equipment intended for inclusion within Heading 9506, HTSUSA, recognizes only that equipment designed exclusively for protection against injury, that is equipment having protective features with the sole or primarily function of directly absorbing the impact of blows, collisions or flying objects. See HQ 958791, dated May 13, 1996 (knee **pads** used for playing sports, elbow **pads** and wrist **guards** are classifiable in Heading 9506); HQ 958387, dated April 8, 1996 (protective gear including knee and elbow **pads** used by in-line skaters to protect their knees, elbows and wrists against impact and abrasion are properly classifiable in Heading 9506); HQ 957120, dated January 31, 1995 (ruling that wrist guards utilized for in line skating are classifiable under Heading 9506); HQ 958190, dated September 5, 1995 (ruling that a hand/forearm **pad**, shin **guards** and elbow **pad** specifically designed to prevent injury while playing football or soccer are properly classifiable as protective sports equipment under Heading 9506); HQ 951406, dated July 13, 1992 (knee **pads**, elbow **pads** and wrist **guards** consisting of hard plastic cups and high impact plastic splint inserts, utilized for sporting activities have the primary function of protecting the wearer during sporting activities and are therefore properly classifiable in Heading 9506) [**Emphasis added**]; NY 862972, dated May 31, 1991 (a padded shin **guard**, specially designed to protect against leg blows in the game of soccer and an elbow support which primarily provides protection against blows or falls qualify for classification in Heading 9506 but a hinged knee support and a back support were excluded from Heading 9506 because neither of these items have as their sole or primary function to directly absorb the impact of blows, collisions or flying objects).

Significantly, the neoprene knee support at issue, is described as neither a "pad" nor a "guard." Rather the item is called a "support." Nor is the knee support designed with the sole or primary function of directly absorbing the impact of blows, collisions or flying objects. Accordingly, Heading 9506, HTSUSA does not apply to the knee support as its function is not to protect from impact imposed by blows, collisions or flying objects.

Having eliminated the possibility of classification under Heading 9021, HTSUSA and Heading 9506, HTSUSA, we must now determine whether the subject merchandise is properly classifiable in either chapter 62 as body supporting articles or in chapter 63 as other made up articles.

### Heading 6212

Heading 6212 provides for *inter alia*, braces. The ENs to Heading 6212, HTSUSA, state in pertinent part:

The Heading covers articles of a kind designed for wear as body-supporting garments or as supports for certain other articles of apparel, and parts thereof \* \* \*

The Heading includes, *inter alia*:

- (1) Brassieres of all kinds.
- (2) Girdles and panty-girdles.
- (3) Corselettes (combinations of girdles or panty-girdles and brassieres).
- (4) Corsets and corset belts. These are usually reinforced with flexible metallic, whalebone or plastic stays, and are generally fastened by lacing or by hooks.
- (5) Suspender-belts, hygienic belts, supersensory bandages, suspender jock-straps, braces, suspenders, garters, shirt-sleeve supporting arm-bands and armlets.
- (6) Body belts for men (including those combined with under pants)
- (7) Maternity, post-pregnancy or similar supporting corrective belts, not being orthopedic appliances of Heading 90.21.

This office is of the opinion that the exemplars to Heading 6212 are united by the fact that they support apparel or other items (e.g. garters) or are forms of garments (e.g. brassieres) and are generally worn underneath other garments as, for example, maternity belts or men's body belts. See HQ 952568, dated January 28, 1993; HQ 952390, dated December 16, 1992; HQ 952201, dated October 26, 1992. The knee support, unlike the exemplars in the ENs to Heading 6212, is not worn as a garment or an accessory to a garment and is therefore not properly classifiable in Heading 6212.

#### *Heading 6307*

Heading 6307, HTSUSA, is a residual provision which provides for other made up articles of textiles. Section Note 7 (e) of Section XI, which covers textiles and textile articles states in pertinent part as follows:

7. For the purposes of this Section the expression "made up" means:

Assembled by sewing \* \* \*

The instant article has been assembled by sewing, therefore they constitute made up textile articles. The Explanatory Notes state regarding Heading 6307:

This Heading covers made up articles of any textile material which are **not included** more specifically in the Heading of Section XI or elsewhere in the Nomenclature.

Since the knee support at issue is not covered by any more specific heading it is classifiable in Heading 6307, HTSUSA.

The ENs to 6307 specifically provide for articles such as the knee support in Note (27) which notes that Heading 6307 includes, in particular:

Support articles of the kind referred to in Note 1 (b) to Chapter 90 for joints (e.g., knees, ankles, elbows or wrist) or muscles (e.g., thigh muscles), **other than** those falling in other Headings of Section XI.

Customs has classified merchandise that is similar to the knee support at issue, knee braces with hinged support bars, under Heading 6307. See 963534, August 29, 2001; See HQ 964317, dated May 1, 2001; HQ 952568, dated January 28, 1993. In addition, this ruling is consistent with several other rulings in which articles supporting joints or organs were classified in Heading 6307. See HQ 958791, dated May 13, 1996 (revoking NY 840648 and classifying a knit elbow/knee support composed of 39 percent cotton and 61 percent man made fibers with ten magnets sewn into the supporter in Heading 6307); HQ 958190, dated September 5, 1995 (ruling that adjustable neoprene knee supports which support the joint solely by means of their elasticity should remain classified in Heading 6307); HQ 952295, dated January 5, 1993 (ruling that a heel cup/anklet composed of neoprene and a soft flexible material such as molded rubber or thermoplastic was classifiable in Heading 6307); HQ 951844, dated September 4, 1992 (ruling that a pair of cotton/stretch nylon wristbands neither of which contained a protective insert or pad were classifiable in Heading 6307); HQ 952390, dated December 16, 1992 (ruling that a lumbar support belt with four or six covered metal vertical stays is classifiable in Heading 6307); NY E82026, dated June 16, 1999 (knee sleeve and wrist sleeve composed of neoprene rubber laminated on both sides with knit fabric classified in Heading 6307).

We note that in NY 862972, dated May 31, 1991, knee supports with hinges, were classified in Heading 6212, HTSUSA. In HQ 087552, dated October 1, 1990, a knee stabilizer composed of neoprene rubber laminated on both the inner and outer surfaces with knit nylon fabric was classified in Heading 6212, HTSUSA. Also in NY A89561, dated December 11, 1996, ankle braces made of a heavy reinforced textile material for the purpose of providing ankle support for football players were classified in Heading 9021, HTSUSA. Finally, in NY D88848, dated April 1, 1999, a knee brace and a knee immobilizer worn only during sporting events by players to provide some support and to reduce the probability of reinjuring the knee joint were classified in Heading 9021, HTSUSA. Appropriate steps are currently being taken to review these decisions and to modify and revoke those rulings as necessary.

#### *Holding:*

The neoprene knee support is properly classified in subheading 6307.90.9989, HTSUSA which provides for "Other made up articles, including dress patterns; Other; Other: Oth-

er: Other: Other." The general column one rate of duty is 7 percent *ad valorem*. There currently is no textile quota category applicable to this provision.

JOHN ELKINS,  
(for John Durant, Director,  
Commercial Rulings Division.)

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[ATTACHMENT B]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE,  
Washington, DC, December 5, 2001.  
CLA-2 RR:CR:TE 965237 BAS  
Category: Classification  
Tariff No. 6307.90.9989

DEBORAH SCOTT  
MODAWEST INTERNATIONAL, INC.  
5246 W. 111<sup>th</sup> Street  
Los Angeles, CA 90045

Re: Modification of NY D88848, April 1, 1999; Classification of a knee brace and knee immobilizer.

DEAR MS. SCOTT:

This is in reference to New York Ruling Letter (NY) D88848 issued to you on April 1, 1999, in response to your letter of October 26, 1998 on behalf of Lantic USA, to the Director, Customs National Commodity Specialist Division in New York, requesting classification under the Harmonized Tariff Schedule of the United States (HTSUS) of an ankle support, a knee brace, a knee immobilizer and a thigh support.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of NY D88848, as described below, was published in the CUSTOMS BULLETIN, Volume 35, Number 42, on October 17, 2001. The Customs Service received no comments during the notice and comment period that closed on November 16, 2001. Customs, as the result of the disruption of mail service, waited two additional weeks until November 30, 2001 before proceeding with this reconsideration and modification. No comments postmarked either before or after the close of the comment period were received.

In NY D88848, April 1, 1999, both a knee brace and a knee immobilizer were classified under subheading 9021.19.8500, HTSUSA, which provides for orthopedic appliances, including crutches, surgical belts and trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability; parts and accessories thereof: Artificial joints and other orthopedic or fracture appliances; parts and accessories thereof: Artificial joints and parts and accessories thereof: Other: Other. We have now had occasion to review that decision and found it to be in error insofar as the classification of the knee brace and knee immobilizer are concerned.

*Facts:*

The merchandise under consideration consists of a knee brace, item number N-KN-56, and a knee immobilizer, item number T-KN-73. The knee brace, item number N-KN-56 is constructed of neoprene laminated on both the inner and outer surface with nylon knit fabric. It is designed with an opening at the knee for patella support. It has two straps which fasten around the knee joint by means of strips similar to the VELCRO brand loop fastener. There are two sleeves, one on each side of the brace, containing a plastic hinged bar to give added stability and support.

The knee immobilizer, item number T-KN-73, is made of foam rubber laminated on the outer surface with brush knit fabric and the inner surface with a knit fabric. The interior side features a thick foam cushion in the center and foam strips, one on each side. It is held

closed with a removable panel made of the same material, one on each exterior side. The panels feature a sleeve with metal stay and strips similar to the VELCRO brand fastener. It is designed to wrap around the knee.

Regarding both items, the advertising on one of the packages indicates that it is worn only during sporting events by players to provide some support and thus reduce the probability of re-injuring the knee joint.

*Issue:*

Whether the knee brace and knee immobilizer are properly classifiable in Heading 9021, HTSUSA, which provides for orthopedic appliances and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability, Heading 9506, HTSUSA, which provides for articles and equipment for general physical exercise and other sports, Heading 6212, HTSUSA, brassieres, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof or under heading 6307, HTSUSA, which provides for other made up textile articles?

*Law and Analysis:*

Classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the Headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the Headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The knee brace and immobilizer are potentially classifiable in four HTSUSA headings. One possible heading is Heading 9021, HTSUSA, which provides for orthopedic appliances and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability. Other possible Headings for the merchandise include Heading 6212, HTSUSA, which provides for braces, Heading 9506, HTSUSA, which provides for articles and equipment for general physical exercise and other sports or Heading 6307, HTSUSA, which provides for other made up textile articles.

*Heading 9021, HTSUSA*

Heading 9021, HTSUSA, provides for "Orthopedic appliances, including crutches, surgical belts and trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability; parts and accessories thereof."

Note 1 (b) of Chapter 90 maintains:

This chapter does not cover supporting belts or other support articles of textile material, whose intended effect on the organ to be supported or held derives solely from their elasticity (for example, maternity belts, thoracic support bandages, abdominal support bandages, supports for joints or muscles (Section XI).

When interpreting and implementing the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, while neither legally binding nor dispositive, provide a guiding commentary on the scope of each Heading, and are generally indicative of the proper interpretation of the HTSUS. Customs believes the ENs should always be consulted. See T.D. 89-90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The ENs to Heading 9021 state that:

This Heading does not include supporting belts or other support articles of the kind referred to in Note 1 (b) to this Chapter, \* \* \* (generally Heading 62.12 or 63.07).

The knee brace and immobilizer at issue do not solely depend on elasticity to support the knee joint and, therefore, would not be precluded from classification in heading 9021 on the basis of Note 1 (b) of Chapter 90.

According to Taber's Cyclopedic Medical Dictionary, Edition 15, 1985, orthopedic is defined as "concerning orthopedics; prevention or correction of deformities." A deformity is defined by Taber's Cyclopedic Medical Dictionary as "an alteration in the natural form of a part or organ. Distortion of any part or general disfigurement of the body. It may be acquired or congenital. If present after injury, usually implies the presence of fracture, dislocation or both. May be due to extensive swelling, extravasation of blood or rupture of muscles."

The packaging of both the knee brace and the knee immobilizer indicates that they are to be worn only during sporting events by players to provide some support and therefore

reduce the possibility of reinjuring the knee joint. The merchandise is not described as being utilized to "prevent or correct bodily deformities." There is no mention of use of either the brace or the immobilizer at issue in relation to the presence of fractures or dislocation.

The ENs to Heading 9021 state, furthermore, that the orthopedic appliances referred to in the heading are appliances for "preventing or correcting bodily deformities" or "supporting or holding organs following an illness or operation." The ENs to Heading 9021 lists the type of orthopedic appliances that are included in that Heading as follows:

1. Appliances for hip diseases (coxalgia, etc.)
2. Humerus splints (to enable use of an arm after resection), (extension splints).
3. Appliances for the jaw.
4. Traction, etc., appliances for the fingers.
5. Appliances for treating Pott's disease (straightening head and spine)
6. Orthopaedic footwear, having enlarged leather stiffener, which may be reinforced with a metal or cork frame, made only to measure.
7. Special insoles, made to measure.
8. Dental appliances for correcting deformities of the teeth (braces, rings, etc.)
9. Orthopedic foot appliances (talipes appliances, leg braces, with or without spring support for the foot, surgical boots, etc.).
10. Trusses (inguinal, cural, umbilical, etc., trusses) and rupture appliances.
11. Appliances for correcting scoliosis and curvature of the spine as well as all medical or surgical corsets and belts (including certain supporting belts) characterized by:
  - (a) Special pads, springs, etc., adjustable to fit the patient.
  - (b) The materials of which they are made (leather, metal, plastic, etc.); or
  - (c) The presence of reinforced parts, rigid pieces of fabric or bands of various widths.

The special design of these articles for a particular orthopedic purpose distinguishes them from ordinary corsets and belts, whether or not the latter also serve to support or hold.

12. Orthopedic suspenders (**other than** simple suspenders of knitted, netted or crocheted materials, etc.)

The description of the knee brace and knee immobilizer at issue indicates they are not "ejusdem generis" or "of the same kind" of merchandise as orthopedic appliances listed in Heading 9021. The merchandise at issue is not intended to be worn post-operation or to correct a bodily deformity but rather to be used to enhance performance during exercise or sports activities. The ENs state that the splints and other fracture appliances referenced in Heading 9021 may be used either to immobilize injured parts of the body or to set fractures. While the ankle braces at issue may restrict movement, they do not **immobilize** the ankle as contemplated in the ENs to Heading 9021. [**Emphasis added**] See HQ 964317, dated May 1, 2001 (ruling that a knee brace made of 90 percent neoprene and 10 percent nylon or polyester and elastic with two hinged metal braces would be excluded from classification in Heading 9021 because it does not immobilize the knee); HQ 958190, dated September 5, 1995, (ruling that a neoprene wrist support containing permanently inserted, rigid plastic support bars that were designed to **immobilize** the wrist in order to relieve tendinitis and prevent recurrence of carpal tunnel syndrome were properly classifiable in 9021). (**Emphasis added**)

These items which may be used to prevent sprains or strains and to support the area of the body where they are worn are not considered to be of the class or kind of appliance used to compensate for bodily deformities or to be used following illnesses or operations of an incapacitating nature. See NY 862972, dated May 31, 1991 (hinged knee support and back support with plastic stiffeners excluded from Heading 9021). The appliances included, in Heading 9021, HTSUSA, e.g., appliances for hip disease, for correcting scoliosis and trusses (used generally for treating hernias) are similar in the sense that they enable the wearer to engage in the activities of everyday life. The knee brace and knee immobilizers are clearly not items that are generally worn in order to function in everyday life but rather to engage in sports activities. We note that orthopaedic footwear and special insoles might also be used by the wearer to engage in athletic activities but the ENs provide that those items are made to measure and not marketed to a mass market as are the subject merchandise in the instant case. The fact that most, if not all, of the items referred to in the ENs to Heading 9021 must be fitted to a particular individual is also a feature which the items at issue do not share with the enumerated articles.

Although the knee brace and knee immobilizer would not be excluded from Heading 9021 because they do not derive support solely from their elasticity, as discussed above, the items are nonetheless not *esjudem generis* with the exemplars in Heading 9021.

#### Heading 9506

Having precluded classification in Heading 9021, HTSUSA, we must determine whether classification in Heading 9506, HTSUSA is appropriate. Heading 9506, HTSUSA provides for, *inter alia*, articles and equipment for gymnastics, athletics, other sports and outdoor games

The ENs to Heading 9506 state in pertinent part:

This heading covers:

(B) Requisites for other sports and outdoor games (other than toys presented in sets, or separately of Heading 95.03), e.g.:

(13) Protective equipment for sports or games, e.g., fencing masks and breast plates, elbow and knee pads, cricket pads, shin-guards.

The sports protective equipment intended for inclusion within Heading 9506, HTSUSA, recognizes only that equipment which is designed exclusively for protection against injury, that is equipment having protective features with the sole or primary function of directly absorbing the impact of blows, collisions or flying objects. See HQ 958791, dated May 13, 1996 (knee **pads** used for playing sports, elbow **pads** and wrist **guards** are classifiable in Heading 9506); HQ 958387, dated April 8, 1996 (protective gear including knee and elbow **pads** used by in-line skaters to protect their knees, elbows and wrists against impact and abrasion are properly classifiable in Heading 9506); HQ 957120, dated January 31, 1995 (ruling that wrist **guards** utilized for in line skating are classifiable under Heading 9506); HQ 958190, dated September 5, 1995 (ruling that a hand/forearm **pad**, shin **guards** and elbow **pad** specifically designed to prevent injury while playing football or soccer are properly classifiable as protective sports equipment under Heading 9506); HQ 951406, dated July 13, 1992 (knee **pads**, elbow **pads** and wrist **guards** consisting of hard plastic cups and high impact plastic splint inserts, utilized for sporting activities have the primary function of protecting the wearer during sporting activities and are therefore properly classifiable in Heading 9506) [**Emphasis added**]; NY 862972, dated May 31, 1991 (a padded shin **guard**, specially designed to protect against leg blows in the game of soccer and an elbow support which primarily provides protection against blows or falls qualify for classification in Heading 9506 but a hinged knee support and a back support were excluded from Heading 9506 because neither of these items have as their sole or primary function to directly absorb the impact of blows, collisions or flying objects).

Significantly, neither the knee brace nor the knee immobilizer at issue is described as either a "pad" or a "guard." Nor is the knee brace or knee immobilizer designed with the sole or primary function of directly absorbing the impact of blows, collisions or flying objects. Accordingly, Heading 9506, HTSUSA does not apply to the knee brace or immobilizer as their function is not to protect from impact imposed by blows, collisions or flying objects.

Having eliminated the possibility of classification under Heading 9021, HTSUSA and Heading 9506, HTSUSA, we must now determine whether the subject merchandise is properly classifiable in either chapter 62 as body supporting articles or in chapter 63 as other made up articles.

#### Heading 6212

Heading 6212 provides for *inter alia*, braces. The ENs to Heading 6212, HTSUSA, state in pertinent part:

The Heading covers articles of a kind designed for wear as body-supporting garments or as supports for certain other articles of apparel, and parts thereof \*\*\*

The Heading includes, *inter alia*:

- (1) Brassieres of all kinds.
- (2) Girdles and panty-girdles.
- (3) Corselettes (combinations of girdles or panty-girdles and brassieres).
- (4) Corsets and corset belts. These are usually reinforced with flexible metallic, whalebone or plastic stays, and are generally fastened by lacing or by hooks.

(5) Suspender-belts, hygienic belts, supersensory bandages, suspender jock-straps braces, suspenders, garters, shirt-sleeve supporting arm-bands and armlets.

(6) Body belts for men (including those combined with under pants)

(7) Maternity, post-pregnancy or similar supporting corrective belts, not being orthopedic appliances of Heading 90.21.

This office is of the opinion that the exemplars to Heading 6212 are united by the fact that they support apparel or other items (e.g. garters) or are garments (e.g. brassieres) and are generally worn underneath other garments as, for example, maternity belts or men's body belts. See HQ 952568, dated January 28, 1993; HQ 952390, dated December 16, 1992; HQ 952201, dated October 26, 1992. The knee brace and knee immobilizer, unlike the exemplars in the ENs to Heading 6212, are not worn as a garment or an accessory to a garment and are therefore not properly classifiable in Heading 6212.

#### Heading 6307

Heading 6307, HTSUSA, is a residual provision which provides for other made up articles of textiles. Section Note 7 (e) of Section XI, which covers textiles and textile articles states in pertinent part as follows:

7. For the purposes of this Section the expression "made up" means:

Assembled by sewing \* \* \*

The instant articles have been assembled by sewing, therefore they constitute made up textile articles. The Explanatory Notes state regarding Heading 6307:

This Heading covers made up articles of any textile material which are **not included** more specifically in the Heading of Section XI or elsewhere in the Nomenclature.

Since the knee brace and knee immobilizer are not covered by any more specific heading, they are classifiable in Heading 6307, HTSUSA.

The ENs to 6307 specifically provide for articles such as the knee brace and knee immobilizer in Note (27) which notes that Heading 6307 includes, in particular:

Support articles of the kind referred to in Note 1 (b) to Chapter 90 for joints (e.g., knees, ankles, elbows or wrist) or muscles (e.g., thigh muscles), **other than** those falling in other Headings of Section XI.

Customs has classified merchandise that is similar to the knee brace and knee immobilizer at issue, knee braces with hinged support bars, under Heading 6307. See 963534, dated August 29, 2001; HQ 964317, dated May 1, 2001; HQ 952568, dated January 28, 1993. In addition, this ruling is consistent with several other rulings in which articles supporting joints or organs were classified in Heading 6307. See HQ 958791, dated May 13, 1996 (revoking NY 840648 and classifying a knit elbow/knee support composed of 39 percent cotton and 61 percent man-made fibers with ten magnets sewn into the supporter in Heading 6307); HQ 958190, dated September 5, 1995 (ruling that adjustable neoprene knee supports which support the joint solely by means of their elasticity should remain classified in Heading 6307); HQ 952295, dated January 5, 1993 (ruling that a heel cup/anklet composed of neoprene and a soft flexible material such as molded rubber or thermoplastic was classifiable in Heading 6307); HQ 951844, dated September 4, 1992 (ruling that a pair of cotton/stretch nylon wristbands neither of which contained a protective insert or pad were classifiable in Heading 6307); HQ 952390, dated December 16, 1992 (ruling that a lumbar support belt with four or six covered metal vertical stays is classifiable in Heading 6307); NY E82026, dated June 16, 1999 (knee sleeve and wrist sleeve composed of neoprene rubber laminated on both sides with knit fabric classified in Heading 6307).

We note that in NY 862972, dated May 31, 1991, knee supports with hinges, were classified in Heading 6212, HTSUSA. In HQ 087552, dated October 1, 1990 and HQ 086667, dated May 9, 1990, a knee stabilizer, and a knee support respectively both composed of neoprene rubber laminated on both the inner and outer surfaces with knit nylon fabric were classified in Heading 6212, HTSUSA. Also in NY A89561, dated December 11, 1996, ankle braces made of a heavy reinforced textile material for the purpose of providing ankle support for football players were classified in Heading 9021, HTSUSA. Appropriate steps are currently being taken to review these decisions and to modify and revoke those rulings as necessary.

#### Holding:

The knee brace and knee immobilizer are properly classified in subheading 6307.90.9989, HTSUSA which provides for "Other made up articles, including dress pat-

terns; Other; Other: Other: Other: Other." The general column one rate of duty is 7 percent *ad valorem*. There currently is no textile quota category applicable to this provision.

JOHN ELKINS,  
(for John Durant, Director,  
Commercial Rulings Division.)

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[ATTACHMENT C]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE  
Washington, DC, December 5, 2001.

CLA-2 RR-CR:TE 965234 BAS  
Category: Classification  
Tariff No. 6307.90.9989

MR. JAMES P SULLIVAN  
SULLIVAN & LYNCH, PC.  
156 State Street  
Boston, MA 02109

Re: Modification of NY 862972, May 31, 1991; Classification of hinged knee support.

DEAR MR. SULLIVAN:

This is in reference to New York Ruling Letter (NY) 862972 issued to you on May 31, 1991, in response to your letter of April 26, 1991 on behalf of Sports Products Marketing Inc. to the Director, Customs National Commodity Specialist Division in New York requesting a ruling on the classification under the Harmonized Tariff Schedule of the United States (HTSUS) of certain Hummel Protect Support Products.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of NY 862972, as described below, was published in the CUSTOMS BULLETIN, Volume 35, Number 42, on October 17, 2001. The Customs Service received no comments during the notice and comment period that closed on November 16, 2001. Customs, as the result of the disruption of mail service, waited two additional weeks until November 30, 2001 before proceeding with this reconsideration and modification. No comments postmarked either before or after the close of the comment period were received.

In NY 862972, May 31, 1991, five protective support products were classified in various subheadings including 6212.90.0030, HTSUS, 9506.99.6080, HTSUS, and 9506.99.2000, HTSUS. A hinged knee support was classified in subheading 6212.90.0030, HTSUS, which provides for brassieres, girdles, corsets, braces, suspenders, garters, and similar articles and parts thereof, whether or not knitted or crocheted, other; of man-made fibers or man-made fibers and rubber or plastics. We have now had occasion to review that decision and found it to be in error insofar as the classification of the hinged knee support is concerned. This ruling letter modifies NY 862972 insofar as it concerns the classification of the hinged knee support.

*Facts:*

The merchandise under consideration consists of a hinged knee support made of neoprene covered by knit nylon fabric on both sides. The knee support measures approximately 30 centimeters in length. The tube-like support consists of two panels. The back panel measures 9 centimeters across and has a 5-centimeter hole at the back of the knee. At the top of the panel is a hook and loop adjustment strap. The front panel covers the front and sides of the knee area. It has a 3-centimeter hole at the knee, a wide hook and loop adjustment strap above the knee, and a narrow adjustment strap below the knee. On each side of the knee there is a covered, hinged metal support. The hinged supports run parallel to the leg, and measure approximately 26 centimeters in length. You stated that the straps and hinges support the knee preventing "reinjury to a previously sensitive knee."

*Issue:*

Whether the hinged knee support is properly classifiable in Heading 9021, HTSUSA, which provides for orthopedic appliances and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability, Heading 9506, HTSUSA, which provides for articles and equipment for general physical exercise and other sports, Heading 6212, HTSUSA, brassieres, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof or under Heading 6307, HTSUSA, which provides for other made up textile articles?

*Law and Analysis:*

Classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the Headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the Headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The hinged knee support is potentially classifiable in four HTSUSA headings. One possible heading is Heading 9021, HTSUSA, which provides for orthopedic appliances and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability. Other possible Headings for the merchandise include Heading 6212, HTSUSA, which provides for braces, Heading 9506, HTSUSA, which provides for articles and equipment for general physical exercise and other sports and Heading 6307, HTSUSA, which provides for other made up textile articles.

*Heading 9021, HTSUSA*

Heading 9021, HTSUSA, provides for "Orthopedic appliances, including crutches, surgical belts and trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability; parts and accessories thereof."

Note 1 (b) of Chapter 90 maintains:

This chapter does not cover supporting belts or other support articles of textile material, whose intended effect on the organ to be supported or held derives solely from their elasticity (for example, maternity belts, thoracic support bandages, abdominal support bandages, supports for joints or muscles (Section XI).

When interpreting and implementing the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, while neither legally binding nor dispositive, provide a guiding commentary on the scope of each Heading, and are generally indicative of the proper interpretation of the HTSUS. Customs believes the ENs should always be consulted. See T.D. 89-90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The ENs to Heading 9021 state that:

This Heading **does not include** supporting belts or other support articles of the kind referred to in Note 1 (b) to this Chapter, \* \* \* (generally Heading 62.12 or 63.07).

While the hinged knee support at issue is a support article of textile material, the metal springs support the joints and therefore the knee support's intended effect on the organ to be supported does not derive solely from its elasticity. Accordingly, the hinged knee support is not precluded from classification in heading 9021, HTSUSA, on that basis.

According to Taber's Cyclopedic Medical Dictionary, Edition 15, 1985, orthopedic is defined as "concerning orthopedics; prevention or correction of deformities." A deformity is defined by Taber's Cyclopedic Medical Dictionary as "an alteration in the natural form of a part or organ. Distortion of any part or general disfigurement of the body. It may be acquired or congenital. If present after injury, usually implies the presence of fracture, dislocation or both. May be due to extensive swelling, extravasation of blood or rupture of muscles."

The importer in the instant case is Sports Products Marketing, Inc. Its products are generally utilized for the enhancement of an athlete's performance and protection from injury during sport activities. The importer does not describe the subject merchandise as being utilized to "prevent or correct bodily deformities." There is no mention of use of the hinged knee support in relation to the presence of fractures or dislocation. The hinged knee support is described as preventing reinjury to a previously "sensitive knee."

Products marketed to athletes to enhance performance are significantly distinguishable from items intended to be worn in order to function while recovering from a fracture

or dislocation or to function in everyday life. Accordingly, we believe the subject merchandise is not included in Heading 9021.

The ENs to Heading 9021 state that the orthopedic appliances referred to in the heading are appliances for "preventing or correcting bodily deformities" or "supporting or holding organs following an illness or operation." The EN to Heading 9021 lists the type of orthopedic appliances that are included in that Heading as follows:

1. Appliances for hip diseases (coxalgia, etc.)
2. Humerus splints (to enable use of an arm after resection), (extension splints).
3. Appliances for the jaw.
4. Traction, etc., appliances for the fingers.
5. Appliances for treating Pott's disease (straightening head and spine)
6. Orthopaedic footwear, having enlarged leather stiffener, which may be reinforced with a metal or cork frame, made only to measure.
7. Special insoles, made to measure.
8. Dental appliances for correcting deformities of the teeth (braces, rings, etc.)
9. Orthopedic foot appliances (talipes appliances, leg braces, with or without spring support for the foot, surgical boots, etc.).
10. Trusses (inguinal, cural, umbilical, etc., trusses) and rupture appliances.
11. Appliances for correcting scoliosis and curvature of the spine as well as all medical or surgical corsets and belts (including certain supporting belts) characterized by:
  - (a) Special pads, springs, etc., adjustable to fit the patient.
  - (b) The materials of which they are made (leather, metal, plastic, etc.); or
  - (c) The presence of reinforced parts, rigid pieces of fabric or bands of various widths.

The special design of these articles for a particular orthopedic purpose distinguishes them from ordinary corsets and belts, whether or not the latter also serve to support or hold.

12. Orthopedic suspenders (**other than** simple suspenders of knitted, netted or crocheted materials, etc.)

The hinged knee support is not "ejusdem generis" or "of the same kind" of merchandise as the orthopedic appliances listed in Heading 9021. The merchandise at issue is not intended to be worn post-operation or to correct a bodily deformity but rather to be used to enhance performance during exercise or sports activities. The hinged knee support prevents common knee injuries and protects unstable knees. The opening helps stabilize the knee cap. The ENs state that the splints and other fracture appliances referenced in Heading 9021 may be used either to immobilize injured parts of the body or to set fractures. While the knee support at issue may restrict movement, it does not **immobilize** the knee as contemplated in the EN to Heading 9021. [**Emphasis added**] See HQ 964317, dated May 1, 2001 (ruling that a knee brace made of 90 percent neoprene and 10 percent nylon or polyester and elastic with two hinged metal braces would be excluded from classification in Heading 9021 because it does not immobilize the knee); HQ 958190, dated September 5, 1995, (ruling that a neoprene wrist support containing permanently inserted, rigid plastic support bars that were designed to **immobilize** the wrist in order to relieve tendinitis and prevent recurrence of carpal tunnel syndrome were properly classifiable in 9021). (**Emphasis added**)

Items which may be used to prevent sprains or strains and to support the area of the body where they are worn are not considered to be of the class or kind of appliance used with recovery from bodily deformity or used following illnesses or operations of an incapacitating nature. See NY 862972, dated May 31, 1991 (hinged knee support and back support with plastic stiffeners excluded from Heading 9021). The appliances included, in Heading 9021, HTSUSA, e.g., appliances for hip disease, for correcting scoliosis and trusses (used generally for treating hernias) are similar in the sense that they enable the wearer to engage in the activities of everyday life. The hinged knee support is not an item that is generally worn in order to function in everyday life but rather to engage in sports activities. We note that orthopaedic footwear and special insoles might also be used by the wearer to engage in athletic activities but the EN provides that those items are made to measure and not marketed to a mass market as are the subject merchandise in the instant case. The fact that most, if not all, of the items referred to in the EN to Heading 9021 must be fitted to a particular individual is also a feature which the item at issue does not share with the enumerated articles.

Although the hinged knee support would not be excluded from Heading 9021 because it does not derive support solely from its elasticity, as discussed above, it is nonetheless not *eiusdem generis* with the exemplars in Heading 9021.

#### Heading 9506

Having precluded classification in Heading 9021, HTSUSA, we must determine whether classification in Heading 9506, HTSUSA is appropriate. Heading 9506, HTSUSA provides for, *inter alia*, articles and equipment for gymnastics, athletics, other sports and outdoor games

The ENs to Heading 9506 state in pertinent part:

This heading covers:

\* \* \* \* \*

(B) Requisites for other sports and outdoor games (other than toys presented in sets, or separately of Heading 95.03), e.g.:

\* \* \* \* \*

(13) Protective equipment for sports or games, e.g., fencing masks and breast plates, elbow and knee pads, cricket pads, shin-guards.

The sports protective equipment intended for inclusion within Heading 9506, HTSUSA, recognizes only such equipment designed exclusively for protection against injury, that is, equipment having protective features with the sole or primarily function of directly absorbing the impact of blows, collisions or flying objects. See HQ 958791, dated May 13, 1996 (knee **pads** used for playing sports, elbow **pads** and wrist **guards** are classifiable in Heading 9506); HQ 958387, dated April 8, 1996 (protective gear including knee and elbow **pads** used by in-line skaters to protect their knees, elbows and wrists against impact and abrasion are properly classifiable in Heading 9506); HQ 957120, dated January 31, 1995 (ruling that wrist guards utilized for in line skating are classifiable under Heading 9506); HQ 958190, dated September 5, 1995 (ruling that a hand/forearm **pad**, shin **guards** and elbow **pad** specifically designed to prevent injury while playing football or soccer are properly classifiable as protective sports equipment under Heading 9506); HQ 951406, dated July 13, 1992 (knee **pads**, elbow **pads** and wrist **guards** consisting of hard plastic cups and high impact plastic splint inserts, utilized for sporting activities have the primary function of protecting the wearer during sporting activities and are therefore properly classifiable in Heading 9506) [**Emphasis added**]; NY 862972, dated May 31, 1991 (a padded shin **guard**, specially designed to protect against leg blows in the game of soccer and an elbow support which primarily provides protection against blows or falls qualify for classification in Heading 9506 but a hinged knee support and a back support were excluded from Heading 9506 because neither of these items have as their sole or primary function to directly absorb the impact of blows, collisions or flying objects).

Significantly, the hinged knee support at issue is described as neither a "pad" nor a "guard." Rather the item is called a "support." Nor is the hinged knee support designed with the sole or primary function of directly absorbing the impact of blows, collisions or flying objects. Accordingly, Heading 9506, HTSUSA does not apply to the hinged knee support as its function is not to protect from impact imposed by blows, collisions or flying objects.

Having eliminated the possibility of classification under Heading 9021, HTSUSA and Heading 9506, HTSUSA, we must now determine whether the subject merchandise is properly classifiable in either chapter 62 as body supporting articles or in chapter 63 as other made up articles.

#### Heading 6212

Heading 6212 provides for *inter alia*, braces. The ENs to Heading 6212, HTSUSA, state in pertinent part:

The Heading covers articles of a kind designed for wear as body-supporting garments or as supports for certain other articles of apparel, and parts thereof \* \* \*

The Heading includes, *inter alia*:

- (1) Brassieres of all kinds.
- (2) Girdles and panty-girdles.
- (3) Corselettes (combinations of girdles or panty-girdles and brassieres).
- (4) Corsets and corset belts. These are usually reinforced with flexible metallic, whalebone or plastic stays, and are generally fastened by lacing or by hooks.

(5) Suspender-belts, hygienic belts, supersensory bandages, suspender jock-strap braces, suspenders, garters, shirt-sleeve supporting arm-bands and armlets.

(6) Body belts for men (including those combined with under pants)

(7) Maternity, post-pregnancy or similar supporting corrective belts, not being orthopedic appliances of Heading 90.21.

This office is of the opinion that the exemplars to Heading 6212 are united by the fact that they support apparel or other items (e.g. garters) or are garments (e.g. brassieres) and are generally worn underneath other garments as, for example, maternity belts or men's body belts. See HQ 952568, dated January 28, 1993; HQ 952390, dated December 16, 1992; HQ 952201, dated October 26, 1992. The hinged knee brace, unlike the exemplars in the ENs to Heading 6212, is not worn as a garment or an accessory to a garment and is therefore not properly classifiable in Heading 6212.

#### Heading 6307

Heading 6307, HTSUSA, is a residual provision which provides for other made up articles of textiles. Section Note 7 (e) of Section XI, which covers textiles and textile articles states in pertinent part as follows:

7. For the purposes of this Section the expression "made up" means:

Assembled by sewing \* \* \*

The instant article has been assembled by sewing, therefore they constitute made up textile articles. The Explanatory Notes state regarding Heading 6307:

This Heading covers made up articles of any textile material which are **not included** more specifically in the Heading of Section XI or elsewhere in the Nomenclature.

Since the hinged knee support at issue is not covered by any more specific heading, it is classifiable in Heading 6307, HTSUSA.

The ENs to 6307 specifically provide for articles such as the hinged knee support in Note (27) which notes that Heading 6307 includes, in particular:

Support articles of the kind referred to in Note 1 (b) to Chapter 90 for joints (e.g., knees, ankles, elbows or wrist) or muscles (e.g., thigh muscles), **other than** those falling in other Headings of Section XI.

Customs has classified merchandise that is almost identical to the knee support at issue, knee braces with hinged support bars, under Heading 6307. See 963534, dated August 29, 2001; HQ 964317, dated May 1, 2001; HQ 952568, dated January 28, 1993. In addition, this ruling is consistent with several other rulings in which articles supporting joints or organs were classified in Heading 6307. See HQ 958791, dated May 13, 1996 (revoking NY 840648 and classifying a knit elbow/knee support composed of 39 percent cotton and 61 percent man made fibers with ten magnets sewn into the supporter in Heading 6307); HQ 958190, dated September 5, 1995 (ruling that adjustable neoprene knee supports which support the joint solely by means of their elasticity should remain classified in Heading 6307); HQ 952295, dated January 5, 1993 (ruling that a heel cup/anklet composed of neoprene and a soft flexible material such as molded rubber or thermoplastic was classifiable in Heading 6307); HQ 951844, dated September 4, 1992 (ruling that a pair of cotton/stretch nylon wristbands neither of which contained a protective insert or pad were classifiable in Heading 6307); HQ 952390, dated December 16, 1992 (ruling that a lumbar support belt with four or six covered metal vertical stays is classifiable in Heading 6307); NY E82026, dated June 16, 1999 (knee sleeve and wrist sleeve composed of neoprene rubber laminated on both sides with knit fabric classified in Heading 6307).

We note that in HQ 087552, dated October 1, 1990 and HQ 086667, dated May 9, 1990, a knee stabilizer and a knee support respectively both composed of neoprene rubber laminated on both the inner and outer surfaces with knit nylon fabric were classified in Heading 6212, HTSUSA. Also in NY A89561, dated December 11, 1996, ankle braces made of a heavy reinforced textile material for the purpose of providing ankle support for football players were classified in Heading 9021, HTSUSA. Finally, in NY D88848, dated April 1, 1999, a knee brace and a knee immobilizer worn only during sporting events by players to provide some support and to reduce the probability of reinjuring the knee joint were classified in Heading 9021, HTSUSA. Appropriate steps are currently being taken to review these decisions and to modify and revoke those rulings as necessary.

#### Holding:

The hinged knee support is properly classified in subheading 6307.90.9989, HTSUSA which provides for "Other made up articles, including dress patterns; Other; Other: Oth-

er: Other: Other." The general column one rate of duty is 7 percent *ad valorem*. There currently is no textile quota category applicable to this provision.

JOHN ELKINS,  
(for John Durant, Director,  
Commercial Rulings Division.)

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[ATTACHMENT D]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE  
Washington, DC, December 5, 2001.  
CLA-2 RR:CR:TE 965236 BAS  
Category: Classification  
Tariff No. 6307.90.9989

MR. STANLEY DREIER  
THE DREIER COMPANY, INC.  
375 Turnpike Road  
East Brunswick, NJ 08816

Re: Revocation of HQ 087552, October 1, 1990; Classification of a knee brace.

DEAR MR. DREIER:

This is in reference to Headquarters Ruling Letter (HQ) 087552 issued to you on October 1, 1990, in response to your letter of June 1, 1990 to the U.S. Customs Service, Office of Regulations and Rulings, requesting classification under the Harmonized Tariff Schedule of the United States (HTSUS) of a knee brace.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of HQ 087552, as described below, was published in the CUSTOMS BULLETIN, Volume 35, Number 42, on October 17, 2001. The Customs Service received no comments during the notice and comment period that closed on November 16, 2001. Customs, as the result of the disruption of mail service, waited two additional weeks until November 30, 2001 before proceeding with this reconsideration and revocation. No comments postmarked either before or after the close of the comment period were received.

In HQ 087552, October 1, 1990, a knee brace was classified under subheading 6212.90.0030, HTSUSA, which provides for brassieres, girdles, corsets, braces, suspenders, garters, and similar articles and parts thereof, whether or not knitted or crocheted, other; of man-made fibers or man-made fibers and rubber or plastics. We have now had occasion to review that decision and found it to be in error. This ruling letter revokes HQ 087552, dated October 1, 1990.

*Facts:*

The merchandise under consideration consists of a knee stabilizer, composed of neoprene rubber laminated on both the inner and outer surfaces with knit nylon fabric. The article has an opening near its center to provide patellar support.

*Issue:*

Whether the neoprene knee stabilizer is properly classifiable in Heading 9021, HTSUSA, which provides for orthopedic appliances and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability, Heading 9506, HTSUSA, which provides for articles and equipment for general physical exercise and other sports, Heading 6212, HTSUSA, brassieres, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof or under heading 6307, HTSUSA, which provides for other made up textile articles?

*Law and Analysis:*

Classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is made in accordance with the General Rules of Interpretation (GRI). GRI 1

provides that the classification of goods shall be determined according to the terms of the Headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the Headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The knee brace is potentially classifiable in four HTSUSA headings. One possible heading is Heading 9021, HTSUSA, which provides for orthopedic appliances and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability. Other possible Headings for the merchandise include Heading 6212, HTSUSA, which provides for braces, Heading 9506, HTSUSA, which provides for articles and equipment for general physical exercise and other sports or Heading 6307, HTSUSA, which provides for other made up textile articles.

#### *Heading 9021, HTSUSA*

Heading 9021, HTSUSA, provides for "Orthopedic appliances, including crutches, surgical belts and trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability; parts and accessories thereof."

Note 1 (b) of Chapter 90 maintains:

This chapter does not cover supporting belts or other support articles of textile material, whose intended effect on the organ to be supported or held derives solely from their elasticity (for example, maternity belts, thoracic support bandages, abdominal support bandages, supports for joints or muscles (Section XI).

When interpreting and implementing the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, while neither legally binding nor dispositive, provide a guiding commentary on the scope of each Heading, and are generally indicative of the proper interpretation of the HTSUS. Customs believes the ENs should always be consulted. See T.D. 89-90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The ENs to Heading 9021 state that:

This Heading **does not include** supporting belts or other support articles of the kind referred to in Note 1 (b) to this Chapter, \* \* \* (generally Heading 62.12 or 63.07).

The neoprene knee brace at issue depends solely on its elasticity to support the joint and therefore, would be excluded from classification in heading 9021 on the basis of Note 1 (b) of Chapter 90.

#### *Heading 9506*

Having precluded classification in Heading 9021, HTSUSA, we must determine whether classification in Heading 9506, HTSUSA is appropriate. Heading 9506, HTSUSA provides for, *inter alia*, articles and equipment for gymnastics, athletics, other sports and outdoor games.

The ENs to Heading 9506 state in pertinent part:

This heading covers:

\* \* \* \* \*

(B) Requisites for other sports and outdoor games (other than toys presented in sets, or separately of Heading 95.03), e.g.:

\* \* \* \* \*

(13) Protective equipment for sports or games, e.g., fencing masks and breast plates, elbow and knee pads, cricket pads, shin-guards.

The sports protective equipment intended for inclusion within Heading 9506, HTSUSA, recognizes only that equipment designed exclusively for protection against injury, that is equipment having protective features with the sole or primarily function of directly absorbing the impact of blows, collisions or flying objects. See HQ 958791, dated May 13, 1996 (knee **pads** used for playing sports, elbow **pads** and wrist **guards** are classifiable in Heading 9506); HQ 958387, dated April 8, 1996 (protective gear including knee and elbow **pads** used by in-line skaters to protect their knees, elbows and wrists against impact and abrasion are properly classifiable in Heading 9506); HQ 957120, dated January 31, 1995 (ruling that wrist guards utilized for in line skating are classifiable under Heading 9506); HQ 958190, dated September 5, 1995 (ruling that a hand/forearm **pad**, shin **guards** and elbow **pad** specifically designed to prevent injury while playing football or soccer are properly classifiable as protective sports equipment under Heading 9506); HQ 951406, dated

July 13, 1992 (knee **pads**, elbow **pads** and wrist **guards** consisting of hard plastic cups and high impact plastic splint inserts, utilized for sporting activities have the primary function of protecting the wearer during sporting activities and are therefore properly classifiable in Heading 9506) [**Emphasis added**]; NY 862972, dated May 31, 1991 (a padded shin **guard**, specially designed to protect against leg blows in the game of soccer and an elbow support which primarily provides protection against blows or falls qualify for classification in Heading 9506 but a hinged knee support and a back support were excluded from Heading 9506 because neither of these items have as their sole or primary function to directly absorb the impact of blows, collisions or flying objects).

Significantly, the neoprene knee brace at issue, is described as neither a "pad" nor a "guard." Rather the item is called a brace or stabilizer. Nor is the knee brace or stabilizer designed with the sole or primary function of directly absorbing the impact of blows, collisions or flying objects. Accordingly, Heading 9506, HTSUSA does not apply to the knee brace as its function is not to protect from impact imposed by blows, collisions or flying objects.

Having eliminated the possibility of classification under Heading 9021, HTSUSA and Heading 9506, HTSUSA, we must now determine whether the subject merchandise is properly classifiable in either chapter 62 as body supporting articles or in chapter 63 as other made up articles.

#### Heading 6212

Heading 6212 provides for *inter alia*, braces. The ENs to Heading 6212, HTSUSA, state in pertinent part:

The Heading covers articles of a kind designed for wear as body-supporting garments or as supports for certain other articles of apparel, and parts thereof \* \* \*

The Heading includes, *inter alia*:

- (1) Brassieres of all kinds.
- (2) Girdles and panty-girdles.
- (3) Corselettes (combinations of girdles or panty-girdles and brassieres).
- (4) Corsets and corset belts. These are usually reinforced with flexible metallic, whalebone or plastic stays, and are generally fastened by lacing or by hooks.
- (5) Suspender-belts, hygienic belts, supersensory bandages, suspender jock-straps braces, suspenders, garters, shirt-sleeve supporting arm-bands and armlets.
- (6) Body belts for men (including those combined with under pants)
- (7) Maternity, post-pregnancy or similar supporting corrective belts, not being orthopedic appliances of Heading 9021.

This office is of the opinion that the exemplars to Heading 6212 are united by the fact that they support apparel or other items (e.g. garters) or are forms of garments (e.g. brassieres) and are generally worn underneath other garments as, for example, maternity belts or men's body belts. See HQ 952568, dated January 28, 1993; HQ 952390, dated December 16, 1992; HQ 952201, dated October 26, 1992. The knee brace, unlike the exemplars in the ENs to Heading 6212, is not worn as a garment or an accessory to a garment and is therefore not properly classifiable in Heading 6212.

#### Heading 6307

Heading 6307, HTSUSA, is a residual provision which provides for other made up articles of textiles. Section Note 7 (e) of Section XI, which covers textiles and textile articles states in pertinent part as follows:

7. For the purposes of this Section the expression "made up" means:

Assembled by sewing \* \* \*

The instant article has been assembled by sewing, therefore they constitute made up textile articles. The Explanatory Notes state regarding Heading 6307:

This Heading covers made up articles of any textile material which are **not included** more specifically in the Heading of Section XI or elsewhere in the Nomenclature.

Since the knee support at issue is not covered by any more specific heading, it is classifiable in Heading 6307, HTSUSA.

The ENs to 6307 specifically provide for articles such as the knee support in Note (27) which notes that Heading 6307 includes, in particular:

Support articles of the kind referred to in Note 1 (b) to Chapter 90 for joints (e.g., knees, ankles, elbows or wrist) or muscles (e.g., thigh muscles), **other than** those falling in other Headings of Section XI.

Customs has classified merchandise that is similar to the knee brace at issue, knee braces with hinged support bars, under Heading 6307. See 963534, dated August 29, 2001; See HQ 964317, dated May 1, 2001; HQ 952568, dated January 28, 1993. In addition, this ruling is consistent with several other rulings in which articles supporting joints or organs were classified in Heading 6307. See HQ 958791, dated May 13, 1996 (revoking NY 840648 and classifying a knit elbow/knee support composed of 39 percent cotton and 61 percent man made fibers with ten magnets sewn into the supporter in Heading 6307); HQ 958190, dated September 5, 1995 (ruling that adjustable neoprene knee supports which support the joint solely by means of their elasticity should remain classified in Heading 6307); HQ 952295, dated January 5, 1993 (ruling that a heel cup/anklet composed of neoprene and a soft flexible material such as molded rubber or thermoplastic was classifiable in Heading 6307); HQ 951844, dated September 4, 1992 (ruling that a pair of cotton/stretch nylon wristbands neither of which contained a protective insert or pad were classifiable in Heading 6307); HQ 952390, dated December 16, 1992 (ruling that a lumbar support belt with four or six covered metal vertical stays is classifiable in Heading 6307); NY E82026, dated June 16, 1999 (knee sleeve and wrist sleeve composed of neoprene rubber laminated on both sides with knit fabric classified in Heading 6307).

We note that in NY 862972, dated May 31, 1991, knee supports with hinges, were classified in Heading 6212, HTSUSA. In HQ 087552, dated October 1, 1990 and HQ 086667, dated May 9, 1990, a knee stabilizer, and a knee support respectively both composed of neoprene rubber laminated on both the inner and outer surfaces with knit nylon fabric were classified in Heading 6212, HTSUSA. Finally, in NY D88848, dated April 1, 1999, a knee brace and a knee immobilizer worn only during sporting events by players to provide some support and to reduce the probability of reinjuring the knee joint were classified in Heading 9021, HTSUSA. Appropriate steps are currently being taken to review these decisions and to modify and revoke those rulings as necessary.

**Holding:**

The neoprene knee brace is properly classified in subheading 6307.90.9989, HTSUSA which provides for "Other made up articles, including dress patterns; Other; Other: Other: Other." The general column one rate of duty is 7 percent *ad valorem*. There currently is no textile quota category applicable to this provision.

JOHN ELKINS,  
(for John Durant, Director,  
Commercial Rulings Division.)

[ATTACHMENT E]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE  
Washington, DC, December 5, 2001.

CLA-2 RR:CR:TE 965238 BAS  
Category: Classification  
Tariff No. 6307.90.9989

JANICE M. PREVITI  
REEBOK INTERNATIONAL LTD.  
100 Technology Center Drive  
Stoughton, MA 02072

Re: Revocation of NY A89561, December 11, 1996; Classification of an ankle brace.

DEAR MS. PREVITI:

This is in reference to New York Ruling Letter (NY) A89561 issued to you on December 11, 1996, in response to your letter of November 15, 1996 to the Director, Customs National Commodity Specialist Division in New York, requesting classification under the Harmonized Tariff Schedule of the United States (HTSUS) of an ankle brace.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement

Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NY A89561, as described below, was published in the *CUSTOMS BULLETIN*, Volume 35, Number 42, on October 17, 2001. The Customs Service received no comments during the notice and comment period that closed on November 16, 2001. Customs, as the result of the disruption of mail service, waited two additional weeks until November 30, 2001 before proceeding with this reconsideration and revocation. No comments post-marked either before or after the close of the comment period were received.

In NY A89561, dated December 11, 1996, an ankle brace was classified under subheading 9021.19.8500, HTSUSA, which provides for orthopedic appliances, including crutches, surgical belts and trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability; parts and accessories thereof: artificial joints and other orthopedic or fracture appliances; parts and accessories thereof: Other: Other. We have now had occasion to review that decision and found it to be in error. This ruling letter revokes NY A89561, dated December 11, 1996.

#### *Facts:*

The merchandise under consideration consists of an ankle brace, which resembles the upper part of a laced up boot and is made of a heavy reinforced textile material. According to your letter, the ankle braces are designed for use by football players as ankle support. The ankle brace was classified in subheading 9021.19.8500, HTSUSA which provides for orthopedic appliances, including crutches, surgical belts and trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability; parts and accessories thereof: artificial joints and other orthopedic or fracture appliances; parts and accessories thereof: Other: Other.

#### *Issue:*

Whether the ankle brace is properly classifiable in Heading 9021, HTSUSA, which provides for orthopedic appliances and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability, Heading 9506, HTSUSA, which provides for articles and equipment for general physical exercise and other sports, Heading 6212, HTSUSA, brassieres, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof or under Heading 6307, HTSUSA, which provides for other made up textile articles?

#### *Law and Analysis:*

Classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the Headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the Headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The ankle brace is potentially classifiable in four HTSUSA headings. One possible heading is Heading 9021, HTSUSA, which provides for orthopedic appliances and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability. Other possible Headings for the merchandise include Heading 6212, HTSUSA, which provides for braces, Heading 9506, HTSUSA, which provides for articles and equipment for general physical exercise and other sports or Heading 6307, HTSUSA, which provides for other made up textile articles.

#### *Heading 9021, HTSUSA*

Heading 9021, HTSUSA, provides for "Orthopedic appliances, including crutches, surgical belts and trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability; parts and accessories thereof."

Note 1(b) of Chapter 90 maintains:

This chapter does not cover supporting belts or other support articles of textile material, whose intended effect on the organ to be supported or held derives solely from their elasticity (for example, maternity belts, thoracic support bandages, abdominal support bandages, supports for joints or muscles (Section XI).

When interpreting and implementing the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, while

neither legally binding nor dispositive, provide a guiding commentary on the scope of each Heading, and are generally indicative of the proper interpretation of the HTSUS. Customs believes the ENs should always be consulted. See T.D. 89-90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The ENs to Heading 9021 state that:

This Heading **does not include** supporting belts or other support articles of the kind referred to in Note 1 (b) to this Chapter, \* \* \* (generally Heading 62.12 or 63.07).

The ankle brace at issue does not solely depend on elasticity to support the ankle joint and, therefore, would not be precluded from classification in heading 9021 on the basis of Note 1 (b) of Chapter 90.

According to Taber's Cyclopedic Medical Dictionary, Edition 15, 1985, orthopedic is defined as "concerning orthopedics; prevention or correction of deformities." A deformity is defined by Taber's Cyclopedic Medical Dictionary as "an alteration in the natural form of a part or organ. Distortion of any part or general disfigurement of the body. It may be acquired or congenital. If present after injury, usually implies the presence of fracture, dislocation or both. May be due to extensive swelling, extravasation of blood or rupture of muscles."

You stated in your original letter that the ankle brace is designed for use by football players to enhance performance and protect from injury during sport activities. You did not describe the subject merchandise as being utilized to "prevent or correct bodily deformities." There is no mention of use of the brace at issue in relation to the presence of fractures or dislocation.

In addition, Reebok International, Ltd. does not focus on the healthcare market but rather the sports gear/sports equipment market. Reebok International's website does not feature medical or healthcare products but rather focuses on athletic shoes and apparel. Accordingly, we do not believe the subject merchandise is the type of orthopedic appliance described by Heading 9021, HTSUSA.

The ENs to Heading 9021 state that the orthopedic appliances referred to in the heading are appliances for "preventing or correcting bodily deformities" or "supporting or holding organs following an illness or operation." The EN to Heading 9021 lists the type of orthopedic appliances that are included in that Heading as follows:

1. Appliances for hip diseases (coxalgia, etc.)
2. Humerus splints (to enable use of an arm after resection), (extension splints).
3. Appliances for the jaw.
4. Traction, etc., appliances for the fingers.
5. Appliances for treating Pott's disease (straightening head and spine)
6. Orthopaedic footwear, having enlarged leather stiffener, which may be reinforced with a metal or cork frame, made only to measure.
7. Special insoles, made to measure.
8. Dental appliances for correcting deformities of the teeth (braces, rings, etc.)
9. Orthopedic foot appliances (talipes appliances, leg braces, with or without spring support for the foot, surgical boots, etc.).
10. Trusses (inguinal, cural, umbilical, etc., trusses) and rupture appliances.
11. Appliances for correcting scoliosis and curvature of the spine as well as all medical or surgical corsets and belts (including certain supporting belts) characterized by:
  - (a) Special pads, springs, etc., adjustable to fit the patient.
  - (b) The materials of which they are made (leather, metal, plastic, etc.); or
  - (c) The presence of reinforced parts, rigid pieces of fabric or bands of various widths.

The special design of these articles for a particular orthopedic purpose distinguishes them from ordinary corsets and belts, whether or not the latter also serve to support or hold.

12. Orthopedic suspenders (**other than** simple suspenders of knitted, netted or crocheted materials, etc.)

The description of the ankle brace at issue indicates that it is not "ejusdem generis" or "of the same kind" of merchandise as orthopedic appliances listed in Heading 9021. The merchandise at issue is not intended to be worn post-operation or to correct a bodily deformity but rather to be used to enhance performance during exercise or sports activities. The ENs state that the splints and other fracture appliances referenced in Heading 9021 may be used either to **immobilize** injured parts of the body or to set fractures. While the ankle braces at issue may restrict movement, they do not immobilize the ankle as contemplated in the EN to Heading 9021. [**Emphasis added**] See HQ 964317, dated May 1, 2001

(ruling that a knee brace made of 90 percent neoprene and 10 percent nylon or polyester and elastic with two hinged metal braces would be excluded from classification in Heading 9021 because it does not immobilize the knee); HQ 958190, dated September 5, 1995, (ruling that a neoprene wrist support containing permanently inserted, rigid plastic support bars that were designed to **immobilize** the wrist in order to relieve tendinitis and prevent recurrence of carpal tunnel syndrome were properly classifiable in 9021). (**Emphasis added**)

These items which may be used to prevent sprains or strains and to support the area of the body where they are worn are not considered to be of the class or kind of appliance used with recovery from bodily deformity or used following illnesses or operations of an incapacitating nature. See NY 862972, dated May 31, 1991 (hinged knee support and back support with plastic stiffeners excluded from Heading 9021). The appliances included in Heading 9021, HTSUSA, e.g., appliances for hip disease, for correcting scoliosis and trusses (used generally for treating hernias) are similar in the sense that they enable the wearer to engage in the activities of everyday life. The ankle brace is clearly not an item that is generally worn in order to function in everyday life but rather to engage in sports activities. We note that orthopaedic footwear and special insoles might also be used by the wearer to engage in athletic activities but the EN provides that those items are made to measure and not marketed to a mass market as are the subject merchandise in the instant case. The fact that most, if not all, of the items referred to in the EN to Heading 9021 must be fitted to a particular individual is also a feature which the items at issue do not share with the enumerated articles.

Although the ankle brace would not be excluded from Heading 9021 because it does not derive support solely from its elasticity, as discussed above, the item is nonetheless not *es-judem generis* with the exemplars in Heading 9021.

#### Heading 9506

Having precluded classification in Heading 9021, HTSUSA, we must determine whether classification in Heading 9506, HTSUSA is appropriate. Heading 9506, HTSUSA provides for, *inter alia*, articles and equipment for gymnastics, athletics, other sports and outdoor games

The ENs to Heading 9506 state in pertinent part:

This heading covers:

\* \* \* \* \*

(B) Requisites for other sports and outdoor games (other than toys presented in sets, or separately of Heading 95.03), e.g.:

\* \* \* \* \*

(13) Protective equipment for sports or games, e.g., fencing masks and breast plates, elbow and knee pads, cricket pads, shin-guards.

The sports protective equipment intended for inclusion within Heading 9506, HTSUSA, recognizes only that equipment which is designed exclusively for protection against injury, that is equipment having protective features with the sole or primarily function of directly absorbing the impact of blows, collisions or flying objects. See HQ 958791, dated May 13, 1996 (knee **pads** used for playing sports, elbow **pads** and wrist **guards** are classifiable in Heading 9506); HQ 958387, dated April 8, 1996 (protective gear including knee and elbow **pads** used by in-line skaters to protect their knees, elbows and wrists against impact and abrasion are properly classifiable in Heading 9506); HQ 957120, dated January 31, 1995 (ruling that wrist guards utilized for in line skating are classifiable under Heading 9506); HQ 958190, dated September 5, 1995 (ruling that a hand/forearm **pad**, shin **guards** and elbow **pad** specifically designed to prevent injury while playing football or soccer are properly classifiable as protective sports equipment under Heading 9506); HQ 951406, dated July 13, 1992 (knee **pads**, elbow **pads** and wrist **guards** consisting of hard plastic cups and high impact plastic splint inserts, utilized for sporting activities have the primary function of protecting the wearer during sporting activities and are therefore properly classifiable in Heading 9506) [**Emphasis added**]; NY 862972, dated May 31, 1991 (a padded shin **guard**, specially designed to protect against leg blows in the game of soccer and an elbow support which primarily provides protection against blows or falls qualify for classification in Heading 9506 but a hinged knee support and a back support were excluded from Heading 9506 because neither of these items have as their sole or primary function to directly absorb the impact of blows, collisions or flying objects).

Significantly, the ankle brace at issue is described as neither a "pad" nor a "guard." Nor is the ankle brace designed with the sole or primary function of directly absorbing the impact of blows, collisions or flying objects. Accordingly, Heading 9506, HTSUSA does not apply to the knee support as its function is not to protect from impact imposed by blows, collisions or flying objects.

Having eliminated the possibility of classification under Heading 9021, HTSUSA and Heading 9506, HTSUSA, we must now determine whether the subject merchandise is properly classifiable in either chapter 62 as body supporting articles or in chapter 63 as other made up articles.

#### Heading 6212

Heading 6212 provides for *inter alia*, braces. The ENs to Heading 6212, HTSUSA, state in pertinent part:

The Heading covers articles of a kind designed for wear as body-supporting garments or as supports for certain other articles of apparel, and parts thereof \*\*\*

The Heading includes, *inter alia*:

- (1) Brassieres of all kinds.
- (2) Girdles and panty-girdles.
- (3) Corselettes (combinations of girdles or panty-girdles and brassieres).
- (4) Corsets and corset belts. These are usually reinforced with flexible metallic, whalebone or plastic stays, and are generally fastened by lacing or by hooks.
- (5) Suspender-belts, hygienic belts, supersensory bandages, suspender jock-straps braces, suspenders, garters, shirt-sleeve supporting arm-bands and armlets.
- (6) Body belts for men (including those combined with under pants)
- (7) Maternity, post-pregnancy or similar supporting corrective belts, not being orthopedic appliances of Heading 90.21.

This office is of the opinion that the exemplars to Heading 6212 are united by the fact that they support apparel or other items (e.g. garters) or are garments (e.g. brassieres) and are generally worn underneath other garments as, for example, maternity belts or men's body belts. See HQ 952568, dated January 28, 1993; HQ 952390, dated December 16, 1992; HQ 952201, dated October 26, 1992. The ankle brace, unlike the exemplars in the ENs to Heading 6212, is not worn as a garment or an accessory to a garment and is therefore not properly classifiable in Heading 6212.

#### Heading 6307

Heading 6307, HTSUSA, is a residual provision which provides for other made up articles of textiles. Section Note 7 (e) of Section XI, which covers textiles and textile articles states in pertinent part as follows:

7. For the purposes of this Section the expression "made up" means:

Assembled by sewing \*\*\*

The instant article has been assembled by sewing, therefore they constitute made up textile articles. The Explanatory Notes state regarding Heading 6307:

This Heading covers made up articles of any textile material which are **not included** more specifically in the Heading of Section XI or elsewhere in the Nomenclature.

Since the ankle brace at issue is not covered by any more specific heading it is classifiable in Heading 6307, HTSUSA.

The ENs to 6307 specifically provide for articles such as the knee support in Note (27) which notes that Heading 6307 includes, in particular:

Support articles of the kind referred to in Note 1 (b) to Chapter 90 for joints (e.g., knees, ankles, elbows or wrist) or muscles (e.g., thigh muscles), **other than** those falling in other Headings of Section XI.

This ruling is consistent with several other rulings in which articles supporting joints or organs were classified in Heading 6307. See HQ 963534, dated August 29, 2001, HQ 964317, dated May 1, 2001; See HQ 958791, dated May 13, 1996 (revoking NY 840648 and classifying a knit elbow/knee support composed of 39 percent cotton and 61 percent man-made fibers with ten magnets sewn into the supporter in Heading 6307); HQ 958190, dated September 5, 1995 (ruling that adjustable neoprene knee supports which support the joint solely by means of their elasticity should remain classified in Heading 6307); HQ 952568, dated January 28, 1993 (knee brace with hinged support bars classified in Head-

ing 6307); HQ 952295, dated January 5, 1993 (ruling that a heel cup/anklet composed of neoprene and a soft flexible material such as molded rubber or thermoplastic was classifiable in Heading 6307); HQ 951844, dated September 4, 1992 (ruling that a pair of cotton/stretch nylon wristbands neither of which contained a protective insert or pad were classifiable in Heading 6307); HQ 952390, dated December 16, 1992 (ruling that a lumbar support belt with four or six covered metal vertical stays is classifiable in Heading 6307); NY E82026, dated June 16, 1999 (knee sleeve and wrist sleeve composed of neoprene rubber laminated on both sides with knit fabric classified in Heading 6307).

We note that in NY 862972, dated May 31, 1991, knee supports with hinges, were classified in Heading 6212, HTSUSA. In HQ 087552, dated October 1, 1990 and HQ 086667, dated May 9, 1990, a knee stabilizer, and a knee support respectively both composed of neoprene rubber laminated on both the inner and outer surfaces with knit nylon fabric were classified in Heading 6212, HTSUSA. Finally, in NY D88848, dated April 1, 1999, a knee brace and a knee immobilizer worn only during sporting events by players to provide some support and to reduce the probability of reinjuring the knee joint were classified in Heading 9021, HTSUSA. Appropriate steps are currently being taken to review these decisions and to modify and revoke those rulings as necessary.

*Holding:*

The ankle brace is properly classified in subheading 6307.90.9989, HTSUSA which provides for "Other made up articles, including dress patterns; Other; Other: Other: Other: Other." The general column one rate of duty is 7 percent *ad valorem*. There currently is no textile quota category applicable to this provision.

JOHN ELKINS,  
(for John Durant, Director,  
Commercial Rulings Division.)

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## REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF LINEAR GUIDE SLIDERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of ruling letter and treatment relating to tariff classification of linear guide sliders.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling relating to the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of linear guide sliders, and revoking any treatment Customs has previously accorded to substantially identical transactions. Notice of the proposed revocation was published on October 30, 2001, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: This revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after February 18, 2002.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202) 927-0760.

## SUPPLEMENTARY INFORMATION:

## BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility**. These concepts are based on the premise that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's rights and responsibilities under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and declare value on imported merchandise, and to provide other necessary information to enable Customs to properly assess duties, collect accurate statistics and determine whether any other legal requirement is met.

Pursuant to Customs obligations, a notice was published on October 30, 2001, in the CUSTOMS BULLETIN, Volume 35, Number 44, proposing to revoke NY B88876, dated August 22, 1997, which classified linear guide sliders in subheading 8473.30.50, HTSUS, as other parts and accessories of the machines of heading 8471. No comments were received in response to this notice.

As stated in the proposed notice, this revocation will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretative ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice, should have advised Customs during the comment period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking NY B88876 to reflect the proper classification of linear guide sliders in subheading 8482.10.50, HTSUS, as other ball bearings, pursuant to the analysis in HQ 964815, which is set forth as the Attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment it previously accorded to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: December 5, 2001.

JOHN ELKINS,  
(for John Durant, Director,  
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,  
U.S. CUSTOMS SERVICE,  
Washington, DC, December 5, 2001.  
CLA-2 RR:CR:GC 964815 JAS  
Category: Classification  
Tariff No. 8482.10.50

ANDREA YBARRA  
STORAGE TEK  
2270 South 88th Street  
Louisville, CO 80028-0001

Re: NY B88876 Revoked; Linear Guide Sliders.

DEAR MS. YBARRA:

In NY B88876, which the Director of Customs National Commodity Specialist Division, New York, issued to you on August 22, 1997, certain linear guide sliders were found to be classifiable in subheading 8473.30.50, Harmonized Tariff Schedule of the United States (HTSUS), as other parts and accessories of the machines of heading 8471.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NY B88876 was published on October 30, 2001, in the CUSTOMS BULLETIN, Volume 35, Number 44. No comments were received in response to that notice.

*Facts:*

The merchandise in NY B88876, identified as part 10110314, is known variously as a linear guide, slider, and linear guide slider. It consists of two rows of circulating ball bearings in a square metal casing affixed to a 15½ inch long metal arm. The arm has round holes punched at 1-inch intervals along its length. The balls circulate in pathways within the casing which allows the casing to travel in grooves up and down the length of the arm with minimal friction. After importation, these linear guide sliders are assembled onto a threader arm, an article that functions as a threader in tape storage peripheral devices which are units of automatic data processing (ADP) machines. These devices thread tape through the tape path from the cartridge to the take-up reel.

The HTSUS provisions under consideration are as follows:

- |                   |  |
|-------------------|--|
| <b>8473</b>       | Parts and accessories * * * suitable for use solely or principally with machines of headings 8469 to 8472: |
| <b>8473.30</b>    | Parts and accessories of the machines of heading 8471:   |
|                   | Not incorporating a cathode ray tube:  |
| <b>8473.30.50</b> | Other  |

8482	Ball or roller bearings, and parts thereof: Ball bearings:
8482.10	Ball Bearings:
8482.10.50	Other

*Issue:*

Whether linear guide sliders are goods included in heading 8482.

*Law and Analysis:*

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS); goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. Though not dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS. Customs believes the ENs should always be consulted. See T. D. 89-80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Subject to certain exceptions that are not relevant here, goods that are identifiable as parts of machines or apparatus of Chapter 84 or Chapter 85 are classifiable in accordance with Section XVI, Note 2, HTSUS. See *Nidec Corporation v. United States*, 861 F. Supp. 136, *aff'd*, 68 F.3d 1333 (1995). Parts which are goods included in any of the headings, of Chapters 84 and 85 are in all cases to be classified in their respective headings. See Note, 2(a). Other parts, if suitable for use solely or principally with a particular machine, or with a number of machines of the same heading; are to be classified with the machines of that kind. See Note 2(b).

The linear guide sliders in NY B88876 were described as parts used with units of automatic data processing machines which qualified them for classification in subheading 8473.30.50 in accordance with Section XVI, Note 2(b), HTSUS. The ruling cited in NY B88876 on supposedly similar merchandise, HQ 955270, dated August 5, 1994, concerned magnetic head sliders. These were articles principally used with automatic data processing machines to read and write from a magnetic disk. These articles consisted of both a mixture of ceramic materials and active sensors or transducer elements deposited onto one end of the slider body using semiconductor manufacturing techniques and ceramic slider bodies into which a magnetic core is bonded with epoxy and glass. The linear guide sliders at issue bear no resemblance, either by function or design, to the magnetic head sliders in HQ 955270.

The ENs on p. 1433 include within heading 8482:

(A) **Ball bearings**, with single or double rows of balls. This group also includes **slide mechanisms with bearing balls**, for example:

(3) The free-travelling type, of steel, comprising a segment, a casing enclosing the bearing balls, and a guide rail with a groove of triangular section. (Emphasis original).

The linear guide sliders at issue consist of a casing enclosing bearing balls and an arm on which it travels, which is the equivalent of a guide rail. These articles are within the cited EN description. Notwithstanding the use of these articles with tape storage peripheral devices which are units of ADP machines, linear guide sliders are goods included in heading 8482 in accordance with Section XVI, Note 2(a). This conclusion is consistent with HQ 086397, dated June 20, 1990, in which linear motion guides were found to be classifiable in subheading 8482.10.50, HTSUS. The articles consisted of a casing enclosing ball bearings and grooved rails. After importation, machine tool tabletops were affixed to the tops of the bearing casings and the assemblies installed in machine tools.

*Holding:*

Under the authority of GRI 1, linear guide sliders represented by part 10110314 are provided for in heading 8482. They are classifiable in subheading 8482.10.50, HTSUS.

*Effect on Other Rulings:*

NY B88876, dated August 22, 1997, is revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

JOHN DURANT,

*Director,*

*Commercial Rulings Division.*

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## REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF DRILL BITS AND ROUTER BITS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of ruling letter and treatment relating to tariff classification of drill bits and router bits.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling relating to the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of drill bits and router bits, and revoking any treatment Customs has previously accorded to substantially identical transactions. Notice of the proposed revocation was published on October 31, 2001, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: This revocation will be effective for merchandise entered or withdrawn from warehouse for consumption on or after February 18, 2002.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202) 927-0760.

### SUPPLEMENTARY INFORMATION:

#### BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility**. These concepts are based on the premise that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's rights and responsibilities under the

Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and declare value on imported merchandise, and to provide other necessary information to enable Customs to properly assess duties, collect accurate statistics and determine whether any other legal requirement is met.

Pursuant to Customs obligations, a notice was published on October 31, 2001, in the CUSTOMS BULLETIN, Volume 35, Number 44, proposing to revoke NY E84599, dated July 15, 1999, which classified certain drill bits and router bits as tools for drilling, other than rock drilling, and as other interchangeable tools, in subheadings 8207.50.80 and 8207.90.75, HTSUS, respectively. No comments were received in response to this notice.

As stated in the proposed notice, this revocation will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretative ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice, should have advised Customs during the comment period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking NY E84599 to reflect the proper classification of the drill bits and router bits in subheadings 8207.50.20 and 8207.90.30, HTSUS, as tools for drilling and as other interchangeable tools, depending on the constituents of the cutting part, pursuant to the analysis in HQ 964755, which is set forth as the Attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment it previously accorded to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: December 5, 2001.

JOHN ELKINS,  
(for John Durant, Director,  
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE,  
Washington, DC, December 5, 2001.  
CLA-2 RR:CR:GC 964755 JAS  
Category: Classification  
Tariff No. 8207.50.20, 8207.90.30

TOMMY HOANG  
EMO TRANS L.A., INC.  
1100 Hindry Ave.  
Los Angeles, CA 90045

Re: NY E84599 Revoked; Drill Bits and Router Bits.

DEAR MR. HOANG:

In NY E84599, which the Director of Customs National Commodity Specialist Division, New York, issued to you on July 15, 1999, on behalf of Ham Technology, certain drill bits and router bits for machines used to manufacture printed circuit boards were found to be classifiable in provisions of heading 8207, Harmonized Tariff Schedule of the United States (HTSUS), as tools for drilling, other than rock drilling, and as other interchangeable tools, respectively.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NY E84599 was published on October 31, 2001, in the CUSTOMS BULLETIN, Volume 35, Number 44. No comments were received in response to that notice.

*Facts:*

The drill bits and router bits were described in NY E84599 as being for use in the printed circuit board industry and as being unsuitable for cutting metal. No further description was provided. These tools are for drilling and routing machines used in the manufacture of printed circuit boards. Literature submitted with the ruling request described solid carbide high performance micro drills, special drills and special drills with stainless hardened steel shanks. Shank diameter, total length, and other dimensions were specified, but the composition of the cutting part of the tools was not indicated.

The HTSUS provisions under consideration are as follows:

- |                   |   |
|-------------------|---|
| <b>8207</b>       | Interchangeable tools for handtools * * * or for machine-tools * * * and rock drilling or earth boring tools; base metal parts thereof: |
| <b>8207.50</b>    | Tools for drilling, other than for rock drilling, and parts thereof:  |
| <b>8207.50.20</b> | With cutting part containing by weight over 0.2 percent of chromium, molybdenum, or tungsten or over 0.1 percent of vanadium            |
|                   | Other, not suitable for cutting metal:  |
| <b>8207.50.80</b> | Other   |

<b>8207.90</b>	Other interchangeable tools, and parts thereof:
<b>8207.90.30</b>	Other cutting tools with cutting part containing by weight over 0.2 percent of chromium, molybdenum, or tungsten or over 0.1 percent of vanadium
<b>8207.90.75</b>	Other:
	Other

*Issue:*

Determining the composition of the cutting parts of the drill bits and router bits.

*Law and Analysis:*

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While not legally binding, the ENs provide a commentary on the scope of each heading of the HTSUS and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. *See* T.D. 89-80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The ENs on p.1204 in part state that the tools of heading 8207 may be either one-piece or composite articles. The one-piece tools, made wholly from one material, are generally of alloy steel or steel with a high carbon content. Composite tools consist of one or more working parts of base metal, of metal carbides or of cermets, of diamond or of other precious or semi-precious stones, attached to a base metal support, either permanently, by welding or insetting, or as detachable parts.

The classifications expressed in NY E84599 were those recommended in your ruling request of July 8, 1999. Subsequently, however, Ham Technology responded to a facsimile inquiry, dated October 26, 2000, from Customs New York office and provided a safety data sheet on the material from which these bits are made. Under the designation Hardmetal, the data sheet indicates the material may also be referred to as cemented carbide or tungsten carbide, the latter with from 3% to 25% cobalt. Similar information from another technical source on carbide tools and related carbide products is a specification identifying a substance with the chemical name "tungsten carbide product with cobalt binder," known variously as Hard Metal, Cemented WC and tungsten carbide. This material is used, among other things in metalworking tools. The specification indicates, for example, that tools of this material are between 2 to 30 percent by weight cobalt and between 70-98 percent, by weight, tungsten carbide. The available evidence now suggests that the drill bits and router bits the subject of NY E84599 may have cutting parts with the requisite percent by weight of tungsten specified in subheadings 8207.50.20 and 8207.90.30, HTSUS.

*Holding:*

Under the authority of GRI 1, drill bits and router bits the subject of NY E84599 are provided for in heading 8207. The drill bits are classifiable in subheading 8207.50.20, HTSUS, and the router bits in subheading 8207.90.30, HTSUS.

*Effect on Other Rulings:*

NY E84599, dated July 15, 1999, is revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

JOHN ELKINS,  
(for John Durant, Director,  
Commercial Rulings Division.)

# United States Court of International Trade

One Federal Plaza  
New York, N.Y. 10278

## *Chief Judge*

Gregory W. Carman

## *Judges*

Jane A. Restani  
Thomas J. Aquilino, Jr.  
Donald C. Pogue  
Evan J. Wallach

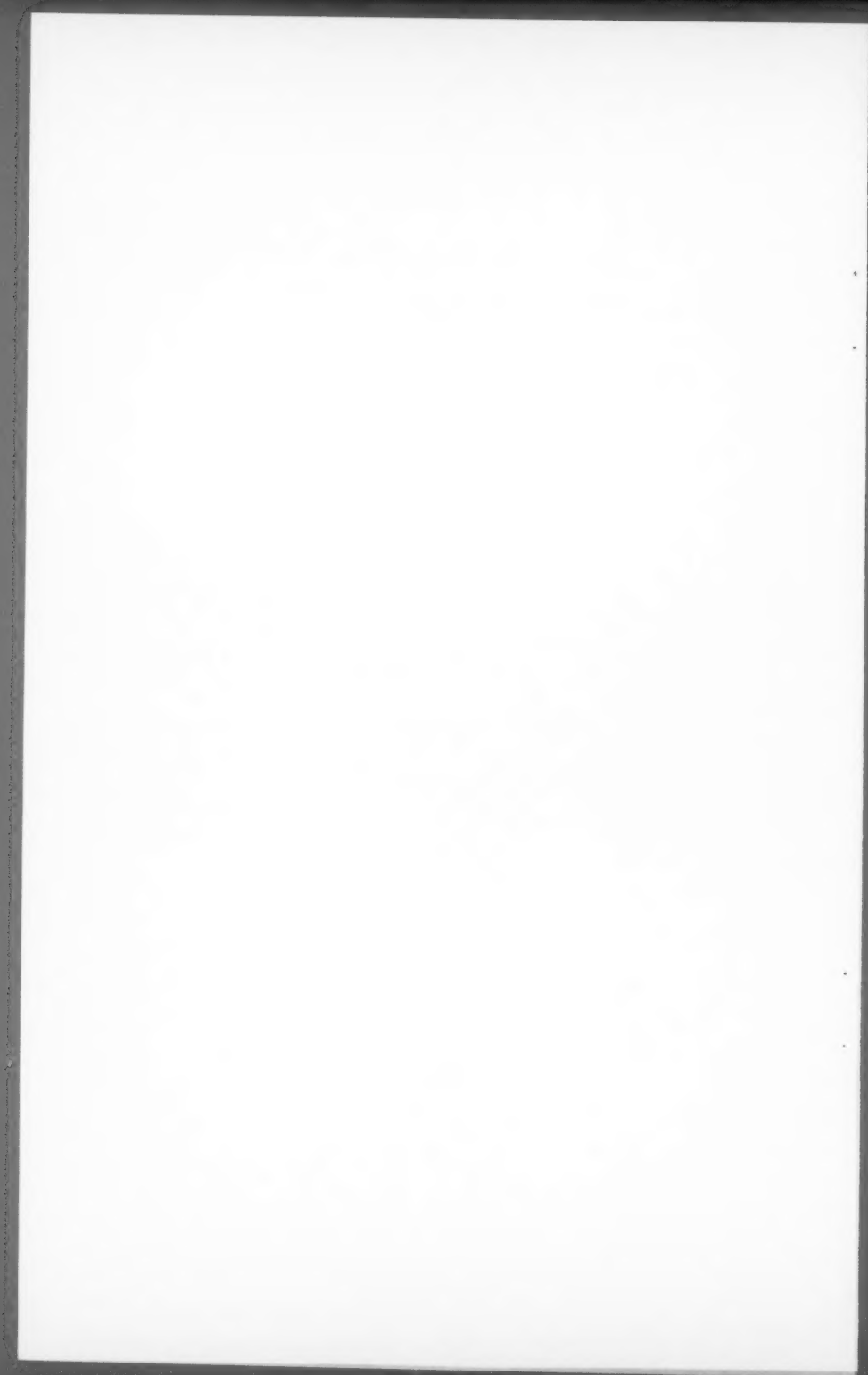
Judith M. Barzilay  
Delissa A. Ridgway  
Richard K. Eaton

## *Senior Judges*

Herbert N. Maletz  
Nicholas Tsoucalas  
R. Kenton Musgrave  
Richard W. Goldberg

## *Clerk*

Leo M. Gordon



# Decisions of the United States Court of International Trade

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(Slip Op. 01-138)

RHODIA, INC., PLAINTIFF v. UNITED STATES, DEFENDANT, AND JILIN  
PHARMACEUTICAL CO., LTD. AND SHANDONG XINHUA PHARMACEUTICAL  
FACTORY, LTD., DEFENDANT-INTERVENORS

Consolidated Court No. 00-08-00407

[ITA determination affirmed-in-part and remanded-in-part.]

(Decided November 30, 2001)

*Williams Mullen Clark & Dobbins (James R. Cannon, Jr., Julia Bailey, Francisco Orelana, Jimmie V. Reyna)* for Plaintiffs.

*Robert D. McCallum, Jr.*, Assistant Attorney General, *David M. Cohen*, Director, *Ada E. Bosque*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Emily Lawson*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel, for Defendant.

*White & Case (William J. Clinton, Adams C. Lee, Robert G. Gosselink, Albert Lo)* for Defendant-Intervenor Jilin Pharmaceutical Co., Ltd.

*Garvey, Shubert & Barer (William E. Perry, John C. Kalitha)* for Defendant-Intervenor Shandong Xinhua Pharmaceutical Factory, Ltd.

## OPINION

POGUE, *Judge*: This case is before the court on motions for judgment upon the agency record challenging certain aspects of the International Trade Administration of the United States Department of Commerce's ("Commerce" or "Department") *Notice of Final Determination: Sales at Less than Fair Value: Bulk Aspirin from the People's Republic of China*, 65 Fed. Reg. 33,805 (Dep't Commerce May 25, 2000), *as amended*, 65 Fed. Reg. 39,598 (Dep't Commerce June 27, 2000) ("*Final Determination*") and the accompanying *Issues and Decision Memorandum*, P.R. Doc. No. 155 (May 17, 2000) ("Decision Memorandum"). This court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(2)(B)(iii).

Plaintiffs in these consolidated actions are foreign and domestic producers of bulk aspirin. Foreign producers, Jilin Pharmaceutical Co., Ltd. ("Jilin") and Shandong Xinhua Pharmaceutical Factory, Ltd.

("Shandong"), argue that (1) Commerce erred in applying overhead costs at each upstream production stage and (2) Commerce inappropriately applied a weighted average ratio rather than a simple average ratio to calculate overhead, selling, general and administrative expenses ("SG&A"), and profit rates. Domestic producer, Rhodia, Inc. ("Rhodia") argues that (1) Commerce improperly used import data rather than domestic data as the surrogate value for phenol; (2) Commerce erred in excluding purchased salicylic acid from Shandong's normal value calculation; and (3) Commerce incorrectly included sales of traded goods in the denominator of the factory overhead ratio. The Department asks for a voluntary remand for the limited purpose of removing sales of traded goods from the denominator of the factory overhead ratio and recalculating the ratio.

#### BACKGROUND

On May 28, 1999, Rhodia filed a petition requesting the imposition of antidumping duties on imports of bulk acetylsalicylic acid, commonly referred to as aspirin, from the People's Republic of China ("PRC"). Rhodia alleged that the subject imports were being sold at prices below fair market value. The Department, in response, initiated an investigation, see *Initiation of Antidumping Duty Investigation: Bulk Aspirin from the People's Republic of China*, 64 Fed. Reg. 33,463 (Dep't Commerce June 23, 1999), and preliminarily determined that bulk aspirin from the PRC was being, or was likely to be, sold in the United States at less than fair value ("LTFV") as provided in section 733 of the Act. See *Notice of Preliminary Determination of Sales at Less Than Fair Value: Bulk Aspirin from the People's Republic of China*, 65 Fed. Reg. 116 (Dep't Commerce Jan. 3, 2000) ("Preliminary Determination").

Pursuant to section 1677b(c), and in accordance with its treatment of the PRC in all past antidumping investigations, Commerce found the PRC to be a nonmarket economy ("NME") country.<sup>1</sup> See *Preliminary Determination* at 117. Finding India to be at a level of economic development comparable to the PRC and a significant producer of bulk aspirin, Commerce selected India as the surrogate market economy country in accordance with 19 U.S.C. § 1677b(c)(4). See *id.* at 119; see also 19 U.S.C. § 1677b(c)(1) (The normal value of goods in a NME country may be ascertained by determining the cost of the "factors of production" used to manufacture the goods.). No party challenges the use of India as the surrogate market economy. See Letter to Sec. Daley from the Law Firm of Stewart & Stewart, P.R. Doc. No. 75 at 1 (Oct. 8, 1999).

#### STANDARD OF REVIEW

The Court must uphold a final determination by Commerce in an antidumping investigation unless it is "unsupported by substantial evi-

<sup>1</sup> The term "nonmarket economy country" is defined by statute as "any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A).

dence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

#### DISCUSSION

Commerce calculates an antidumping duty margin by comparing the imported products' price in the United States to the normal value of comparable merchandise. See 19 U.S.C. § 1677b(a). Generally, normal value is the price of the merchandise in the producer's home market, its export price to countries other than the United States, or a constructed value of the merchandise. See 19 U.S.C. § 1677b(a)(1). When the exporting country is a NME country, however, section 1677b(c) requires that Commerce "shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1)(B).

##### *I. Application of Overhead Costs at each Upstream Production Stage*

Once Commerce determined India to be the appropriate surrogate country for the PRC, it sought surrogate values for each factor of production, and for general expenses and profit. Factory overhead is "one component of a product's cost of manufacturing." See *Air Prods. & Chems., Inc. v. United States*, 22 CIT 433, 441, 14 F. Supp. 2d 737, 745 (1998). The value of factory overhead is calculated as a percentage of manufacturing costs. See *id.*; *Magnesium Corp. of Am. v. United States*, 20 CIT 1092, 1102, 938 F. Supp. 885, 896 (1996). Commerce calculates a ratio of overhead to material, labor and energy inputs ("MLE") for producers of comparable merchandise in the surrogate country, India, and then applies this ratio to the NME producer's MLE. See 19 C.F.R. § 351.408(c)(4).

In its final determination Commerce used data from three Indian producers of aspirin inputs to separately account for overhead costs for each upstream production stage for Jilin and Shandong.<sup>2</sup> Commerce determined that "the degree of integration of a facility affects a facility's overhead costs." Def.'s Mem. Opp'n to Mot. J. Agency R. at 22 ("Def.'s Mem."). Because it determined that none of the Indian producers reflect the degree of integration represented by Shandong and Jilin, Commerce concluded that a single application of an overhead ratio would understate overhead expenses, not reflecting the expenses incurred to produce two major inputs into aspirin and the final aspirin product itself. *Decision Memorandum* at 11-12.

Jilin and Shandong argue, however, that not only did Commerce merely assume that a fully integrated producer has a higher overhead to raw material input ratio than a non-integrated producer, but Commerce also assumed that the operations of the Indian producers were not fully integrated. Shandong further argues that Commerce's methodology is a

<sup>2</sup>Commerce used surrogate values from three Indian producers: Alta Laboratories, Ltd. ("Alta"), Andhra Sugars, Ltd. ("Andhra"), and Gujarat Organics, Ltd. ("Gujarat"). See Shandong Br. at 24.

change from Commerce's prior practice and contrary to the plain language of the statute.

#### A. Accordance with law

Section 1677b(c) requires normal value to be calculated "on the basis of the value of the factors of production utilized \* \* \* to which shall be added *an amount* for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c) (emphasis supplied). Shandong argues that Commerce, by applying an overhead ratio at each upstream production stage, added *amounts* and *costs* into the dumping margin calculation. Shandong Br. Supp. Mot. J. Agency R. at 13 ("Shandong Br."). Rather, according to Shandong, Commerce should have applied the overhead amount at one time and as an overall percentage. In support of this argument, Shandong cites to the Department's *Antidumping Manual* and what it argues is mandatory language in the statute. See *id.* at 13-14; Int'l Trade Admin., U.S. Dep't Commerce, *Antidumping Manual*, Chap. 8 at 85 (1998) ("*Antidumping Manual*"); 19 U.S.C. § 1677b(c).

The statute does require that the Department include an amount for overhead expenses. Commerce, contrary to Shandong's assertions, did only include "an" amount. "Amount" is defined as "a: the total number or quantity; b: the quantity at hand or under consideration." Merriam-Webster, available at <http://www.m-w.com>. In this case, Commerce argues that to account for the overhead expenses of an integrated producer, it was necessary to look at the expenses incurred during each stage of the multi-stage production process. Commerce used surrogate factory overhead values for each stage of the multi-stage process and calculated a total amount based on these figures. The calculated overhead rate was not contrary to the statute as only a single figure for general expenses and profit was included in normal value. Normal value, therefore, only included the total number and quantity under consideration, consistent with "an amount," not "amounts" as Shandong contends.

Furthermore, Shandong's reliance on the *Antidumping Manual* is misplaced.<sup>3</sup> The manual, under a section entitled "Sample Calculation for [Normal Value]," presents a "very simple example of the type of factors valuation calculation that is done in investigations or reviews involving merchandise from a NME country." *Antidumping Manual*, Chap. 8 at 92. The methodology that the manual presents is merely an example; further, it is a "very simple example." This implies that Commerce is not bound exactly to this very simple example in the *Antidumping Manual*; rather, the Manual presents a model that illustrates one approach to calculating the factory overhead ratio. The production process utilized in the making of bulk aspirin, however, is not a simple process. Therefore, Commerce did not depart from prior practice by not

<sup>3</sup> It should be noted that while the *Antidumping Manual* "is not a binding legal document, it does give insight into the internal operating procedures of Commerce." *Koenig & Bauer-Albert AG v. United States*, 24 CIT \_\_\_\_\_, 90 F. Supp. 2d 1284, 1292 n.13 (2000), *aff'd in part, vacated in part, remanded by* 259 F.3d 1341 (Fed. Cir. 2001).

following the *Antidumping Manual's* "simple example"; but instead used this model and adapted it to a more complex situation.

### B. Substantial Evidence

Shandong and Jilin also argue that the Department did not show why overhead would be higher for an integrated producer, nor support its finding that Indian producers have a lower overhead with evidence from the record.

Commerce's determination is reviewed on the basis of the reasons articulated and evidence relied on in its decision. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). Furthermore, Commerce must articulate a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

In this case, Commerce adopted Rhodia's argument, stating in its *Decision Memorandum* that "[a] fully integrated producer will have an overhead to raw material input ratio that is higher than the same ratio for a non-integrated producer, other things being equal." *Decision Memorandum* at 11 ("[W]e agree with the petitioner that degree of integration is a relevant factor that can affect overhead rates."). Beyond this conclusory statement, Commerce gave no explanation for its finding that producers of bulk aspirin in the PRC are more integrated than the surrogate producers in India. *See id.* at 11-12. The *Decision Memorandum* also failed to identify any evidence in the record to support Commerce's conclusion. For example, Commerce does not cite any evidence to support its finding that vertically integrated producers have higher overhead costs or that, except with regard to the level of integration, the Indian and PRC producers are otherwise "equal." Although Commerce's brief addresses in greater detail the reasons that integrated producers have higher overhead costs, the "'post hoc rationalizations' of counsel [cannot] supplement or supplant the rationale or reasoning of the agency." *Hoogovens Staal BV v. United States*, 24 CIT \_\_\_, \_\_\_, 86 F. Supp. 2d 1317, 1331 (2000) (internal citations and quotations omitted); *see also Burlington Truck Lines*, 371 U.S. at 168-69; *Fed. Power Comm'n v. Texaco, Inc.*, 417 U.S. 380, 397 (1974).

Not only, however, did the *Decision Memorandum* state that integrated producers have higher overhead costs than non-integrated producers generally, Commerce also found that producers of bulk aspirin in the PRC were more fully integrated than the Indian surrogates. *See Decision Memorandum* at 11 ("After considering all available information on the record, [Commerce] determine[d] that none of the Indian producers reflect the degree of integration represented by the respondents in this investigation."). Of the three surrogate companies only one, Andhra, produces aspirin, and its aspirin production is equal to just 3.57 percent of the company's total sales. *See id.* The other surrogate Indian companies, Alta and Gujarat, do not produce aspirin but do produce salicylic acid and derivatives. *See id.* Based on this evidence, Commerce determined that the Indian surrogates only produce aspirin inputs and,

therefore, "are more representative of the overhead expense incurred by the upstream input producers." *Id.* at 12.

Commerce's determination that the Indian surrogate companies only produce aspirin inputs is flawed. This statement is based on the premise that (1) Andhra produces only a minuscule amount of aspirin, so the majority of its output is also aspirin inputs;<sup>4</sup> and (2) Alta and Gujarat produce salicylic acid and derivatives and that these derivatives are aspirin inputs. While salicylic acid is an input in aspirin production, aspirin is also a derivative of salicylic acid. *See* Jilin Mem. Supp. Mot. J. Agency R. at 18 ("Jilin Br."). Salicylic acid derivatives, therefore, are not necessarily just aspirin inputs. Alta and Gujarat, as producers of "salicylic acid and derivatives," and Andhra as a producer of bulk chemicals other than aspirin, could be producers of merchandise identical or comparable to aspirin. Therefore, the conclusion that Indian surrogates only produce aspirin inputs does not follow from the premise that Alta and Gujarat produce salicylic acid derivatives and Andhra produces bulk chemicals. Consequently, Commerce's conclusion is not based on a reasonable inference drawn from the evidence in the record.

As previously discussed, Commerce's findings must be "reached by 'reasoned decision-making,' including \* \* \* a reasoned explanation supported by a stated connection between the facts found and the choice made." *Elec. Consumers Res. Council v. Fed. Energy Regulatory Comm'n*, 747 F.2d 1511, 1513 (D.C. Cir. 1984) (citing *Burlington Truck Lines*, 371 U.S. at 168). Here, Commerce has not drawn a reasonable inference from the evidence in the record in order to support its finding that producers in the PRC are more fully integrated than the Indian producers or that the salicylic acid derivatives produced by Alta and Gujarat or the chemicals produced by Andhra are the result of a less integrated production process.

By failing to make any findings regarding its choice, *see Taiwan Semiconductor Indus. Ass'n v. United States*, 23 CIT \_\_\_, \_\_\_, 59 F. Supp. 2d 1324, 1336 (1999), *aff'd*, 266 F.3d 1339 (Fed. Cir. 2001), Commerce errs. Accordingly, Commerce's overhead calculation is remanded for reconsideration. On remand, Commerce is to articulate the facts in the record that support its remand determination.

## II. Weighted Average v. Simple Average

In the final determination, Commerce calculated surrogate overhead, SG&A, and profit ratios using a weighted average of the three Indian producers; Alta, Andhra, and Gujarat.<sup>5</sup> Jilin and Shandong argue that a weighted average is not appropriate when there are a limited number of

<sup>4</sup> The majority of Andhra's production is bulk chemicals other than aspirin. These chemicals include acetic acid, acetic anhydride and caustic soda. *See Decision Memorandum* at 11-12. According to Commerce, many of these chemicals are inputs for aspirin production. *See id.* Absent some explanation from Commerce, the Court cannot determine whether this evidence is sufficient to support Commerce's conclusion that Andhra's overhead costs are not representative because the chemicals produced are the result of a less integrated production process.

<sup>5</sup> Commerce's treatment of the overhead ratio provides an example of the weighted average calculation. Commerce calculated overhead ratios "by dividing the total overhead expenses for all three producers by the total expenses for materials, labor, and energy. A simple average overhead ratio would first calculate the overhead ratios for each of the three producers, and then take the straight average of those three ratios." Jilin Br. at 22 n.72.

data points, that Commerce has a long-standing practice of using simple averages, and that the decision to use a weighted average is not supported by substantial evidence.<sup>6</sup> See *Jilin Br.* at 7, 22; *Shandong Br.* at 12.

In almost every antidumping investigation where Commerce uses only a few surrogate companies, Commerce applies a simple average to derive overhead, SG&A, and profit.<sup>7</sup> See, e.g., *Certain Preserved Mushrooms From the People's Republic of China*, 65 Fed. Reg. 66,703, 66,707 (Dep't Commerce Nov. 7, 2000); *Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China*, 62 Fed. Reg. 61,964, 61,970 (Dep't Commerce Nov. 20, 1997). In only one case did Commerce explicitly use a weighted average, and the decision was not, in that case, questioned by the parties. See *Final Results: Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from the People's Republic of China*, 64 Fed. Reg. 61,837 (Dep't Commerce Nov. 15, 1999). The issue of averages is specifically addressed in very few cases, the most informative being *Notice of Final Determination of Sales at Less Than Fair Value: Bicycles From the People's Republic of China*, 61 Fed. Reg. 19,026, 19,039 (Dep't Commerce Apr. 30, 1996) ("*Bicycles*").

In *Bicycles*, the respondents asked Commerce to calculate a weighted average factory overhead, SG&A, and profit for each Indian producer of bicycles because, the respondent argued, a clear correlation existed between costs and production quantities for all of the Indian bicycle producers. The Department rejected this position, agreeing with the petitioners that the use of the weighted average method would imply that the experience of larger Indian producers was more representative of Chinese producers than smaller Indian producers. According to the Department not all Chinese producers were large scale producers. Moreover, several factors, other than costs and production quantities, could affect overhead, SG&A, and profit ratios. Consequently, Commerce "used a simple average \* \* \* consistent with [its] normal practice because, barring evidence to the contrary, we assume that all of these surrogate values are equally representative of the surrogate experience." *Id.* (emphasis added).

Here, no such findings concerning representativeness were made. Commerce applied a weighted average with no explanation of its reasoning. The general practice of Commerce is to apply a simple average. In

<sup>6</sup> Rhodia argues that Shandong and Jilin did not previously raise this issue and therefore waived their right to have this Court review it. Exhaustion, however, is only required to the extent that the court determines it appropriate. 26 U.S.C. § 2637(d). Here, Shandong and Jilin were under no notice that Commerce would apply a weighted average. It was not until the Factors Valuation Memorandum on May 17, 2000 that the decision to use a weighted average was made. See Memorandum, Factors of Production Valuation for the Final Determination, P.R. Doc. No. 156 at 1 (May 17, 2000) ("Final Factors Memo."). This was the same day the Decision Memorandum was issued. See *Decision Memorandum* at 1. Accordingly, neither Shandong nor Jilin will be required by the court to further exhaust its administrative remedies with regard to this issue.

<sup>7</sup> In some cases, Commerce relies upon weighted average information derived from the *Reserve Bank of India Bulletin*. This information, however, is based on the aggregated financial statistics of an entire industry sector. Here, Commerce only used financial data from three companies. When only a small set of numbers are used to calculate a weighted average overhead ratio, the result will be significantly affected by the size of the companies. In this case Commerce's weighted average was 21.06. See *Final Factors Memo.* at 12. This is close to the overhead ratio of Andhra, the largest of the three Indian producers. See *id.* To calculate Andhra's overhead ratio of 21.64, we divided Andhra's overhead cost of 372,987,500 by its MLE of 172,353,400. See *id.* at Exhibit EE.

order to depart from this practice Commerce needs to "explain the reasons for its departure." *Hussey Copper, Ltd. v. United States*, 17 CIT 993, 997, 834 F. Supp. 413, 418 (1993) (internal quotations and citations omitted); *Allegheny Ludlum Corp. v. United States*, 24 CIT \_\_\_, \_\_\_, 112 F. Supp. 2d 1141, 1147 (2000). It is possible, on remand, that Commerce will determine that a weighted average is the correct method to calculate the necessary ratios. Commerce must, however, give an explanation for this decision. See, e.g., *Bicycles*, 61 Fed. Reg. at 19,039 (indicating the necessity of citing evidence as to why the surrogate values are or are not "equally representative of the surrogate experience").

### III. Import Data v. Domestic Data

Not only must Commerce assign surrogate values for general expenses, but Commerce must also assign surrogate values to each factor of production in order to construct a normal value.<sup>8</sup> One such factor of production is phenol, an aspirin input. See *Preliminary Determination* at 119; see also 19 U.S.C. § 1677b(c)(3).

In order to calculate normal value Commerce assigned a value to phenol using surrogate Indian prices.

India imposes a tariff on phenol imports that can be waived through a duty drawback system. According to Commerce, this creates a "two-tiered" price structure, one for use in the sale of domestic products and the other for use in the sale of merchandise for export. As a result of India's tariff structure, Commerce determined that the Indian domestic phenol price was artificially high and, therefore, valued phenol by using the import price from the *India Chemical Weekly*. Rhodia contends that Commerce not only departed from prior practice by using the import price rather than the domestic price but that this decision was also not supported by substantial evidence. See Mem. Supp. Rhodia's Mot. J. Agency R. at 2 ("Rhodia's Br.").

#### A. Departure from Prior Practice

"[T]he valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority." 19 U.S.C. § 1677b(c)(1). As the statute does not define "best available information," it "grants to Commerce broad discretion to determine the 'best available information' in a reasonable manner on a case-by-case basis." *Timken Co. v. United States*, slip op. 01-96, at 12 (CIT Aug. 9, 2001). This discretion is curtailed by the purpose of the statute, i.e., to construct the product's normal value as it would have been if the NME country were a market economy country. See *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1375 (Fed. Cir. 1999); *Baoding Yude Chem. Indus. Co., Ltd. v. United States*, slip op. 01-117, at 4 (CIT Sept. 26, 2001); see also *Air Prods. & Chems.*, 22 CIT at 435, 14 F. Supp. 2d at 741 (citing *Tianjin Mach. Import & Export Corp. v.*

<sup>8</sup> Factors of production include, but are not limited to, labor, raw materials, utilities and capital costs. See 19 U.S.C. § 1677b(c)(3).

*United States*, 16 CIT 931, 940, 806 F. Supp. 1008, 1018 (1992); *Timken Co. v. United States*, 16 CIT 142, 144, 788 F. Supp. 1216, 1218 (1992)<sup>9</sup>.

In previous administrative reviews of a Chinese product containing phenol, Commerce used the Indian domestic value of phenol in calculating normal value. Specifically, Rhodia points to Commerce's actions in *Sebacic Acid from the People's Republic of China*, 64 Fed. Reg. 69,503 (Dec. 13, 1999) and the preliminary determination in the subsequent annual review of *Sebacic Acid*, 65 Fed. Reg. 18,968, 18,971 (April 10, 2000), where Commerce used the *India Chemical Weekly* average domestic price. The valuation of phenol in those administrative reviews does not, however, require Commerce to use the domestic phenol price in the present case. The decision on which price to use—domestic or import—is based on which value will result in a more accurate normal value. In the past, the domestic phenol value may have been "best available information." Previous circumstances and the mere fact that the domestic price is available do not require Commerce to continue using the domestic value of phenol. See *Issues and Decision Memorandum for the Administrative Review of Manganese Metal from the People's Republic of China*, 66 Fed. Reg. 15,076 (Dep't Commerce March 15, 2001) ("[A] surrogate value which is the best available information during one investigation or review does not necessarily remain the best available information during subsequent reviews."). In fact, in the final determination for *Sebacic Acid* Commerce did not value phenol using domestic *India Chemical Weekly* data and instead valued phenol using *India Chemical Weekly* import data. See *Sebacic Acid from the People's Republic of China*, 65 Fed. Reg. 49,537 (Dep't Commerce Aug. 14, 2000).

Rhodia notes that Commerce has a stated preference for the use of the domestic price over the import price, all else being equal. This preference, as previously discussed, does not require Commerce to use the domestic price in all circumstances. The use of the domestic price as surrogate values is not appropriate when the available domestic data is distorted by a protective tariff. See *Nation Ford*, 166 F.3d at 1377; *Baoding Yude*, slip op. 01-117 at 14;<sup>10</sup> *Decision Memorandum* at 5-6. In such situations the domestic and import price are not "equal" surrogates. This practice is consistent with Congress' intention that Commerce not use distorted surrogate prices. See *Nation Ford*, 166 F.3d at 1377-78; H.R. Conf. Rep. No. 100-576, at 590 (1988), reprinted in 1988 U.S.C.C.A.N. 1547, 1623. Furthermore, in the past, Commerce has used import prices to value factors of production where it determines that the import price is the more accurate value. See *Nation Ford Chem. Co. v. United States*, 21 CIT 1371, 1373, 985 F. Supp. 133, 135 (1997), *aff'd*, 166 F.3d 1373 (Fed. Cir. 1999); *Nation Ford Chem. Co. v. United States*, 21

<sup>9</sup> These cases, regarding Commerce's NME methodology, were decided under the pre-Uruguay Round version of the antidumping statute. However, this aspect of the statute was not changed by the Uruguay Round amendments. Compare 19 U.S.C. § 1677b(c) (1988) with 19 U.S.C. § 1677b(c) (1994).

<sup>10</sup> This Court's opinion in *Baoding Yude* is consistent with Commerce's decision here. In *Baoding Yude*, the previous distortion of the domestic price was substantially diminished by the reduction in the tariff. See *Baoding Yude*, slip op. 01-117, at 14-17. Therefore, the import price was no longer the best available information, as it had been in previous administrative reviews; rather, the use of the domestic price resulted in the most accurate normal value.

CIT 1378, 1378-79, 985 F. Supp. 138, 139-40 (1997); *Tehnoimportexport, UCF Am. Inc. v. United States*, 16 CIT 13, 15-16, 783 F. Supp. 1401, 1404-05 (1992).

Therefore, in accordance with the statute, Commerce has the discretion to determine that the import price of phenol is the more accurate surrogate value for determining normal value in the PRC under the circumstances present during the period of investigation. Thus, Commerce's use of import values is not a departure from its prior practice and is appropriate as long as its decision is supported by substantial evidence.

### *B. Substantial Evidence*

According to Rhodia, the Indian tariff cited by Commerce does not distort the domestic price but distorts the import price. Rhodia Br. at 14, 19. Rhodia argues that Commerce ignored the evidence, including the safeguard measures imposed by India on phenol imports, demonstrating the tariff's effect on the import price. *Id.* at 18. Rhodia also contends that the record establishes that the Indian surrogate producers purchase the majority of their raw materials domestically and therefore Commerce should have used the domestic price for phenol. *Id.* at 18-19. Lastly, Rhodia argues that Commerce's normal value determination was internally inconsistent. *Id.* at 19.

There is substantial evidence supporting Commerce's use of the import price to value phenol rather than the domestic price. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co v. NLRB*, 305 U.S. 197, 229 (1938). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

Here, Commerce's main reason for using the import value of phenol was the existence of the 59.97 percent tariff imposed on imports. See *Decision Memorandum* at 6. This import tariff, according to Commerce, resulted in the distortion of the Indian domestic price. In support of its decision, Commerce demonstrated that by adjusting "the weight-averaged import phenol price (from ICW) of 29.81 Rs/kg by the tariff percentage, the resulting value, 46.51 Rs/kg, is virtually equal to the weight-averaged domestic phenol price from ICW—46.50 Rs/kg." *Id.*<sup>11</sup> Commerce reasoned that the high tariff, in this case, is being used to protect domestic phenol. While it may be, as Rhodia claims, that the evidence in the record could be construed to reach a different result, this court cannot conclude that Commerce's inference is unreasonable. See *Am. Silicon Techs. v. United States*, 23 CIT \_\_\_, \_\_\_, 63 F. Supp. 2d 1324, 1331 (1999), *aff'd*, 261 F.3d 1371 (Fed. Cir. 2001) ("The specific de-

<sup>11</sup> If the import price adjusted by the tariff is either equal to or greater than the domestic price, as is the case here, it supports Commerce's finding that the domestic price is "distorted," in that it is protected by the tariff. The import price is therefore a lower price and the tariff is added to make the imported product more expensive in comparison to the domestic product. The reverse is also true. If the adjusted import price is less than the domestic price, it supports a finding that the domestic price is no longer protected by the tariff. See, e.g., *Baoding Yude*, slip op. 01-117, at 14.

termination we make is whether the evidence and reasonable inferences from the record support" Commerce's findings.) (quoting *Daewoo Elecs. v. United States*, 6 F.3d 1511, 1520 (Fed. Cir. 1993)).

Commerce need not use the domestic value of phenol, as Rhodia suggests, merely because the surrogate Indian producers use primarily domestic raw material inputs. See *Nation Ford*, 166 F.3d at 1377. In calculating normal value in a NME country, Commerce must determine what the market price for inputs would be in the PRC "if such prices \* \* \* were determined by market forces." *Nation Ford*, 21 CIT at 1373, 985 F. Supp. at 135 (internal citations and quotations omitted). Best available information is not a distorted domestic price, even if the producers in the surrogate country use the domestic product. Rather, best available information is the price that results in the most accurate calculation of what the cost of production would be in the PRC if the PRC were a market-economy country.

Moreover, Commerce did not, as Rhodia appears to argue, ignore the effects of India's safeguard duties on the Indian import price of phenol. In the *Decision Memorandum*, Commerce addresses Rhodia's concerns about India's invocation of the WTO's Safeguards Clause on phenol imports. See *Decision Memorandum* at 6. Commerce noted that although the safeguard action did impose a duty on all imports of phenol, this duty was not applied until after the period of investigation. See *id.*; see also *Rhodia Br.* at 18. India did not even invoke the WTO Safeguards Clause until August 12, 1999, more than four months after the end of the period of investigation. See *Preliminary Determination* at 117; *Final Determination* at 33,805.

Furthermore, a safeguards action does not indicate that the price of phenol imports was distorted. Safeguard actions do not account for whether imports are being dumped or are fairly traded. See *WTO Agreement on Safeguards* at Art. 2.1. The only evidence needed to impose a safeguard duty is injury to the domestic market. See *id.* The safeguards action, therefore, does not demonstrate that phenol imports were not fairly traded.<sup>12</sup>

Moreover, Commerce's determination was also internally consistent.<sup>13</sup> Rhodia refers to *Lasko Metal Prods., Inc. v. United States*, 16 CIT 1079, 1081, 810 F. Supp. 314, 317 (1992), *aff'd*, 43 F.3d 1442 (Fed. Cir. 1994), in support of its argument that use of the import price for phenol's surrogate value does not promote accuracy in the dumping margin. In *Lasko*, the parties challenged Commerce's "mix and match"

<sup>12</sup> As further evidence that the domestic values were distorted by tariffs, Jilin notes that the domestic values "increased substantially after the imposition of the safeguard duties." *Jilin Br. Opp'n Rhodia's Mot. J. Agency R.* at 15.

<sup>13</sup> Rhodia also states that Commerce used an "extreme comparison," comparing "the highest domestic value from any source with the lowest import value." *Rhodia Br.* at 15 (emphasis omitted). Commerce, however, compared the average *India Chemical Weekly* import value with average *India Chemical Weekly* domestic value to determine the effect of the tariff. The comparison of two average values is a reasonable comparison, especially when the two values are obtained from the same source.

methodology.<sup>14</sup> *Id.* at 1080, 810 F. Supp. at 317. In that case, this court held that a mix and match methodology is permissible under the statute, and "[o]nly if the combination of surrogate values \* \* \* would somehow produce less accurate results would Commerce's use of this information be unreasonable." *Lasko*, 16 CIT at 1081, 810 F. Supp. at 317.

Here, Commerce found that the best available information for determining normal value is the Indian import price for phenol. Commerce determined that the use of the import price, even though it resulted in a mix and match methodology, produced a more accurate result than using domestic prices to value all the surrogate costs. This court has recognized Commerce's use of both import and domestic prices in order to obtain a more accurate normal value. *See Nation Ford*, 166 F.3d at 1378 (Section "1677b(c) merely requires the use of the 'best available information' with respect to the valuation of a given factor of production; it does not require that a uniform methodology be used in the valuation of all relevant factors.").

Moreover, the "purpose of the [NME] factors of production methodology \* \* \* is not to construct the cost of manufacturing the subject merchandise in India per se but to use data from one or more surrogate countries to construct what the cost of production would have been in China were China a market economy." *Baoding Yude*, slip op. 01-117, at 22 (internal citations and quotations omitted). As a result, Indian producers' costs are not necessarily the appropriate surrogates for all costs. Here, the domestic price of phenol was a distorted price because, as Commerce explained, the high tariff on imports influenced domestic prices. Consistent with Congress' directive to avoid such distortions, Commerce rejected what it found to be an inaccurate domestic price, instead using a "mix and match methodology" that allowed it to obtain the most accurate normal value. "This type of line-drawing exercise is precisely the type of discretion left within the agency's domain." *Baoding Yude*, slip op. 01-117, at 17-18. As long as Commerce's methodology "seek[s] to effectuate the statutory purpose—calculating accurate dumping margins," as is the case here, and is supported by substantial evidence, the margin will be upheld. *Shakeproof Assembly Components v. United States*, 23 CIT \_\_\_, \_\_\_, 59 F. Supp. 2d 1354, 1358 (1999).

Here, Commerce "explain[ed] its finding of significance, with sufficient \* \* \* reference to the record[,] and it is not the role of this Court to re-weigh that evidence. *Shakeproof Assembly Components v. United States*, 24 CIT \_\_\_, \_\_\_, 102 F. Supp. 2d 486, 495 (2000), *aff'd*, slip op. 00-1521 (Fed. Cir. Oct. 12, 2001). Therefore, determining that the import value for phenol was the best available information on the record was a proper exercise of Commerce's discretion.

<sup>14</sup> This "mix and match" methodology refers to a combination of values used to calculate normal value. *Lasko* involved the combination of surrogate values and prices paid by NME producers to market-economy suppliers. *Lasko*, 16 CIT at 1080-81, 810 F. Supp. at 316. The arguments in *Lasko* are equally compelling in the instant case, where Commerce used different surrogate sources within a single surrogate country to determine the most accurate normal value.

#### IV. Calculation of Normal Value for Shandong

Salicylic acid is a major input in bulk aspirin. Shandong both purchases and produces salicylic acid. According to Shandong, whether it purchases or produces salicylic acid determines the quality of the end product. Based in part on this information, Commerce concluded that only self-produced salicylic acid was used in the production of the subject merchandise. As a result, Commerce excluded costs associated with Shandong's purchase of salicylic acid, only including costs associated with Shandong's self-production of salicylic acid in calculating Shandong's normal value.

Rhodia, however, argues that the record does "not support the conclusion that domestic-quality aspirin was in all cases inferior or even different" from export-quality aspirin. Rhodia Br. at 23. According to Rhodia, Commerce "assume[d]" domestic-quality and export-quality aspirin were different "solely on the basis of whether the aspirin has a certificate of compliance with the USP standard." *Id.* Commerce, in Rhodia's view, erred by not considering whether purchased salicylic acid was used in aspirin essentially equivalent to USP23-grade aspirin.<sup>15</sup>

##### A. Subject Merchandise

The antidumping statute defines the subject merchandise as part of "the class or kind of merchandise that is within the scope of an [anti-dumping] investigation." 19 U.S.C. § 1677(25). The only type of aspirin that can be sold in the United States is that meeting USP standards. *See Preliminary Determination* at 117; Petition from Law Firm of Stewart & Stewart to Sec. Commerce, C.R. Doc. No. 1 at 40 (May 5, 1999). As a result, in the investigation, Commerce defined the subject merchandise as bulk aspirin meeting USP23 standards.<sup>16</sup>

Preceding the *Initiation Notice*, Commerce set aside a period for parties to comment upon product coverage. Rhodia did not attempt to do so. Even more compelling is that Rhodia, as the petitioner in the underlying investigation, specified USP standards as a description of the subject merchandise. *See Initiation Notice* at 33, 463-64. Rhodia argues that the issue of the scope of the subject merchandise was not raised until verification. However, Rhodia, as a party to the investigation, helps Commerce to "guide the [investigation] process and must alert the agency to matters which [it] believe[s] require unusually detailed inquiry." *Allied Tube & Conduit Corp. v. United States*, 25 CIT \_\_\_, \_\_\_, 132 F. Supp.

<sup>15</sup> Rhodia contends that Commerce did not establish that CP95 certified aspirin, the Chinese aspirin standard, is inferior to USP23 aspirin, the United States aspirin standard. This argument was not previously made before the agency because, according to Rhodia, the issue was not raised until verification. Therefore, Rhodia asks the court to take judicial notice of the published standards, USP23 and CP95. It is not necessary for the Court to consider Rhodia's request as Commerce's determination on the scope of the investigation is affirmed.

<sup>16</sup> The scope of the investigation was determined to be:

bulk acetylsalicylic acid, commonly referred to as bulk aspirin, whether or not in pharmaceutical or compound form, not put up in dosage form (tablet, capsule, powders or similar form for direct human consumption). Bulk aspirin may be imported in two forms, as pure orthoacetylsalicylic acid or as mixed ortho-acetylsalicylic acid. Pure ortho-acetylsalicylic acid can be either in crystal form or granulated into a fine powder (pharmaceutical form). This product has the chemical formula  $C_9H_8O_4$ . It is defined by the official monograph of the United States Pharmacopoeia ("USP") 23. It is classified under the Harmonized Tariff Schedule of the United States ("HTSUS") sub-heading 2918.22.1000.

*Preliminary Determination* at 117.

2d 1087, 1092 (2001); *see generally* *Wheatland Tube Co. v. United States*, 21 CIT 808, 973 F. Supp. 149 (1997), *aff'd*, 161 F.3d 1365 (1998).

Commerce, in its *Final Determination*, found "that bulk aspirin produced [by Shandong] for the Chinese domestic market (*i.e.* domestic-quality aspirin) [was] distinct, in quality and composition, from subject merchandise." *Decision Memorandum* at 20. The subject merchandise is USP quality aspirin, not just aspirin exported to the United States, as Rhodia claims. The Department specifically found that the Chinese domestic-quality aspirin produced by Shandong was of a different quality than that meeting USP standards. *See id.* ("Shandong's domestic-quality aspirin is not within the scope of this investigation because it does not meet the quality standards, as established by the United States Pharmacopoeia."). As a result, Commerce properly determined that Shandong's domestic-quality aspirin was not within the scope of the investigation because it did not meet the USP quality standards.<sup>17</sup>

The statute requires Commerce to calculate normal value "on the basis of the value of the factors of production utilized in producing the merchandise." 19 U.S.C. § 1677b(c)(1). During the course of Commerce's verification of Shandong's facilities, Commerce "reviewed invoices, certificates of analysis and production/batch reports for both domestic and export sales of subject merchandise." Def.'s Br. at 50; *see also* *Memorandum, Results of Sales Verification of Shandong Xinhua Pharmaceutical Factory*, P.R. Doc. No. 140 at 12 (April 4, 2000); *Shandong Verification Ex. at F-4*. Commerce verified that Shandong only uses self-produced salicylic acid in the manufacture of export-quality salicylic acid. *See Decision Memorandum* at 20.<sup>18</sup> In accordance with the statute, Commerce only includes those factors of production, such as Shandong's self-produced salicylic acid, actually used in producing the subject merchandise, USP quality aspirin. *See id.* at 20-21. Therefore, Commerce correctly determined and applied the scope of the subject merchandise.

#### B. Low Cost

Rhodia argues that Commerce is allowing Shandong to manipulate normal value through "cost-shifting." *E.I. DuPont de Nemours & Co. v. United States*, 4 F. Supp. 2d 1248, 1253 (1998). Allegedly, in order to manipulate the normal value in this manner, Shandong would assign low cost inputs, *i.e.* phenol, to U.S. exports and high-cost inputs, *i.e.* salicylic acid, to domestic sales.

<sup>17</sup> Additional evidence exists in the record demonstrating that the USP23 standard has sixteen inspection items while CP95 has only eight. *See* Shandong Br. Opp'n Rhodia's Mot. J. Agency R. at 32 (citing to Shandong Verification Ex. at S-4); *see also* Shandong Verification Ex. at F-8. Based on this, Commerce could reasonably conclude that USP23 is a more difficult standard to meet.

<sup>18</sup> All the parties agree that salicylic acid is sold in different grades. *See* Petition from Law Firm of Stewart & Stewart to Sec. Of Commerce, P.R. Doc. No. 1 at 13 (May 28, 1999). "[W]ithout further processing, salicylic acid contains impurities such as sodium sulfate." *Id.* This grade is "typically termed 'technical' grade salicylic acid." *Id.* at 14. According to Rhodia, "pharmaceutical grade" salicylic acid, without any impurities, is needed to produce aspirin. *See id.* Although "technical-grade" salicylic acid could be used to produce USP quality aspirin if it undergoes a "sublimation process," *see id.*, there is no indication that the technical-grade salicylic acid purchased by Shandong actually goes through such a process. Therefore, Commerce's determination that Shandong produces two distinct products is consistent with Rhodia's claim that only pharmaceutical grade salicylic acid can be used to produce USP quality aspirin.

As previously discussed, Commerce's decisions to use the import value of phenol and to exclude the cost of purchased salicylic acid are supported by substantial evidence and otherwise in accordance with law. Furthermore, Commerce determined that "Shandong uses one production process and one production facility to produce two distinct products." *Decision Memorandum* at 20. Because there is only one production process, Commerce reasonably concluded that it did not allow Shandong to assign the low-cost production process to serve as a basis for normal value. *Id.* at 21.

#### V. Traded Goods

Commerce, in its final determination, included the cost of Gujarat's "trade sales" in the denominator of the factory overhead rate. "Trade sales" or "traded goods" are products that "are already manufactured and do not affect production."<sup>19</sup> *Timken Co. v. United States*, 23 CIT \_\_\_, \_\_\_, 59 F. Supp. 2d 1371, 1379 (1999); *Timken Co.*, slip op. 01-96, at 48. The *Timken* cases held that Commerce should not include sales of traded goods in the denominator for calculating an overhead ratio because these goods have no effect on production. *Timken Co.*, slip op. 01-96, at 48-50.

Commerce, recognizing its error in this regard, asks for a voluntary remand to remove traded goods from the denominator for the calculation of overhead ratio. Although all the parties agree that the inclusion of trade sales has a minimal effect on the overall ratio if Commerce continues to use a weighted average, remand of this issue to Commerce is appropriate as this court is remanding other aspects of the final determination, including Commerce's use of a weighted average. Accordingly, Commerce's request is granted.

#### CONCLUSION

The Department shall reconsider its determination in a manner consistent with this opinion. The Department shall file its remand determination with the Court within 90 days. The parties are granted 30 days to file comments on the remand determination. The Department may respond to any comments filed within 20 days.

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<sup>19</sup> The parties refer to "trade sales" and "traded goods." In this case, the reporting of the "trade sales" is synonymous with "traded goods." Both are finished merchandise that do not affect production.

(Slip Op. 01-139)

U.S. STEEL GROUP, A UNIT OF USX CORP. AND BETHLEHEM STEEL CORP.,  
 PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND NIPPON STEEL CORP.,  
 DEFENDANT-INTERVENOR

Court No. 00-03-00136

[Plaintiffs' motion for judgment on the agency record denied; final results of agency administrative review sustained.]

(Decided November 30, 2001)

*Skadden, Arps, Slate, Meagher & Flom LLP (Robert E. Lighthizer, John J. Mangan, Jeffrey D. Gerrish), for Plaintiffs.*

*Robert D. McCallum, Jr., Assistant Attorney General; David M. Cohen, Director, Michele D. Lynch, Janene Marasciullo, Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; Stephen M. De Luca, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel, for Defendant.*

*Gibson, Dunn & Crutcher LLP (Daniel J. Plaine, Andrea F. Dynes, Merritt R. Blakeslee, Lisa A. Murray), for Defendant-Intervenor.*

## OPINION

POGUE, *Judge*: This matter is before the Court on the motion of U.S. Steel Group, a unit of USX Corporation, and Bethlehem Steel Corporation ("Plaintiffs"), for judgment on the agency record pursuant to USCIT Rule 56.2. Plaintiffs challenge the Department of Commerce's ("Commerce") calculation of the dumping margin for Nippon Steel Corporation ("NSC") in *Certain Corrosion-Resistant Carbon Steel Flat Products from Japan: Final Results of Antidumping Duty Administrative Review*, 65 Fed. Reg. 8,935 (Dep't Commerce Feb. 23, 2000) ("Final Results"). The Court denies Plaintiffs' motion and sustains the final results of the administrative review.

## BACKGROUND

On February 23, 2000, Commerce published its Final Results in the fifth administrative review of the antidumping duty order on corrosion-resistant carbon steel flat products from Japan. The period of review was August 1, 1997 through July 31, 1998. The review covered exports of two Japanese manufacturers, including NSC.<sup>1</sup>

NSC sells corrosion-resistant carbon steel flat products ("CRS") to both the Japanese and U.S. markets. In calculating the dumping margin for NSC, Commerce compared sales to the same customer in both the home and U.S. markets. The customer, Customer A, is a trading corporation affiliated with Corporation B.<sup>2</sup> See Petitioner's Factual Information Re: NSC, Dun & Bradstreet Company Report, Customer A, Pro.

<sup>1</sup> The review also covered Kawasaki Steel Corporation, which is not a party to the current action.

<sup>2</sup> Throughout this opinion, [ ] is referred to as Customer A and [ ] is referred to as Corporation B.

Doc. No. 23 at 1, 5, 11 (Jan. 19, 1999).<sup>3</sup> Corporation B uses a substantial quantity of NSC's products,<sup>4</sup> and makes most of its purchases of NSC's CRS through Customer A. See Petitioners' Comments on NSC Response to Sections A-D of the Antidumping Questionnaire, Pro. Doc. No. 22 at 28 (Jan. 15, 1999) ("Petitioner's Comments on NSC Response to Sections A-D"); NSC Third Supplemental Questionnaire Response, Pro. Doc. No. 40 at 2 (May 24, 1999). NSC enters into price negotiations with both Customer A and Corporation B to set price ranges but not final prices. NSC also offers certain pricing arrangements to trading companies and end users,<sup>5</sup> including Corporation B. See NSC Section A Response at A-20 - A-22. In the U.S., Customer A is the importer of record, see NSC Response to Sections B-D of the Antidumping Questionnaire, Pro. Doc. No. 16, at C-46 (Dec. 8, 1998), and as such is responsible for payment of antidumping duties.

Plaintiffs assert (1) that the use of sales to the same customer in both the home and U.S. markets to determine normal value results in an unfair comparison, and (2) that the sales in question were outside the ordinary course of trade and should have been excluded from the normal value calculations.

#### STANDARD OF REVIEW

The Court will uphold an antidumping review determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

"Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (internal citations and quotations omitted); *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1393 (Fed. Cir. 1997). The possibility of drawing two inconsistent conclusions from the evidence does not mean that an agency's finding is not supported by substantial evidence. *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). A decision will be reviewed on the grounds invoked by the agency, see *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), and the Court may "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974).

#### DISCUSSION

##### I. Fair Comparison

In calculating a dumping margin, Commerce compares the price of a good in the U.S. to its price in the exporting country, known as its normal

<sup>3</sup>Cites to the administrative record specify whether reference is made to a public document ("Pub. Doc.") or to a proprietary document ("Pro. Doc.").

<sup>4</sup>Corporation B is the [ ] of NSC's products. See Petitioners' Comments on NSC Response to Sections A-D, Pro. Doc. No. 22 at 28; see also NSC Sales Verification Memorandum, Pro. Doc. No. 59, Ex. 37 at 70, 72 (July 22, 1999) ("Verification Memo").

<sup>5</sup>NSC [ ] trading companies and [ ], including Corporation B. See NSC Response to Section A of the Antidumping Questionnaire, Pro. Doc. No. 1 at A-20 - A-22 (Oct. 22, 1998) ("NSC Section A Response").

value.<sup>6</sup> 19 U.S.C. § 1677b(a) requires that this comparison be "fair," stating that "a fair comparison shall be made between the export price or constructed export price and normal value." The statute further states that "[i]n order to achieve a fair comparison \* \* \* normal value shall be determined as follows. \* \* \*" *Id.* The paragraphs that follow set out the steps Commerce must take in determining normal value, and include adjustments and exclusions of sales intended to ensure the accuracy of the normal value determination and the resultant dumping margin calculation.

In the instant case, Commerce included home market sales from NSC to Customer A in its normal value determination, and also used sales to Customer A in determining the U.S. price. The dumping margin is therefore calculated using sales to the same customer in both markets. Plaintiffs contend that in using sales to the same customer in both markets, Commerce failed to make the "fair comparison" required by 19 U.S.C. § 1677b(a). Plaintiffs argue that both the seller and the customer had financial interests in avoiding antidumping duties and incentives to mask any dumping that was taking place, which rendered reported prices unreliable, *see* Pl.'s Mem. Supp. Mot. J. Agency R. ("Pl.'s Mem.") at 13, and created the potential for price manipulation. *Id.* at 21. Plaintiffs assert that these risks caused the price comparison to be unfair, and required the exclusion of the transactions even without actual evidence of inaccurate price reporting or price manipulation. *See id.* at 21-22.

Plaintiffs refer to three cases to support their claim that Commerce should have excluded from the price comparison the sales to Customer A in both markets. *Koenig & Bauer-Albert AG v. United States*, 22 CIT \_\_\_, 15 F. Supp. 2d 834 (1998), involved the alteration of contract prices after the filing of an antidumping petition. The court upheld Commerce's decision to base the price comparison on the original, rather than the adjusted, contract price, because the adjusted, post-petition prices were considered potentially suspect and open to manipulation and Commerce had been unable to verify them. *See Koenig*, 22 CIT at \_\_\_, 15 F. Supp. 2d at 840.

*Koyo Seiko Co. v. United States*, 20 CIT 920, 936 F. Supp. 1040 (1996), *aff'd in part, vacated in part* by 121 F.3d 726 (Fed. Cir. 1997), involved Commerce's discretionary decision to employ a set-splitting methodology to calculate the foreign market value of a product. The court noted that "[i]n the absence of set-splitting, a respondent may compel the use of constructed value by selling sets in one market and single [products] in another." *Id.* at 930, 936 F. Supp. at 1048. Concerned that such a practice could impede the calculation of the most accurate foreign market value possible and help to circumvent the antidumping laws, the court

<sup>6</sup>Normal value is

the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price.

19 U.S.C. § 1677b(a)(1)(B).

deferred to Commerce's reasonable choice of methods for achieving the most accurate calculation. *Id.*

Finally, in *Zenith Elecs. Corp. v. United States*, 15 CIT 394, 770 F. Supp. 648 (1991), *rev'd on other grounds*, 77 F.3d 426 (Fed. Cir. 1996) this Court remanded for further investigation the issue of whether certain sales were fictitious because "there was sufficient material in the record to raise a reasonable suspicion that some or all of the Canadian sales were contrived for the purpose of serving as the basis for a favorable FMV calculation." *Zenith*, 15 CIT at 406, 770 F. Supp. at 659 (emphasis supplied). Under *Zenith*, Commerce has a duty to investigate further where there is sufficient evidence on the record to raise a reasonable suspicion that the sales in question are not representative of the market. *See id.* at 406-07, 770 F. Supp. at 659.

These three cases are distinguished by the fact that in each of them, Commerce had reason to believe the sales or prices in question were unreliable in some manner. In the instant case, however, Commerce did not find evidence that would raise a reasonable suspicion that the reported prices were unreliable or subject to manipulation, or that the sales in question were not representative of the market and should have been excluded. In fact, Commerce was able to verify NSC's pricing practices and relationships with Customer A and Corporation B. *See* Verification Memo. Plaintiffs apparently propose that Commerce has a duty to exclude sales from the margin calculation even in the absence of evidence suggesting their unreliability, but this proposition is unsupported in the statute, regulations, and case law.<sup>7</sup>

In the administrative review prior to the matter at issue here, Commerce found that it is not unusual for there to be sales to both markets through the same customer. Final Results at 8,940; *see also Certain Corrosion-Resistant Carbon Steel Flat Products From Japan: Final Results of Antidumping Duty Administrative Review*, 64 Fed. Reg. 12,951, 12,954 (Dep't Commerce Mar. 16, 1999) ("Fourth Review") ("That the customer in question purchased the identical product in both markets is not, in itself, unusual, nor suggestive of an intentional evasion or circumvention of the antidumping duty law."). According to Commerce, the existence of sales to the same customer in both markets involved in the comparison "is not, on its own, sufficient grounds to reject comparisons of such sales in calculating the dumping margin." Mem. U.S. Opp'n to Mot. J. Agency R. ("Def.'s Mem.") at 13-14 (quoting Pl.'s Mem. at 17); *see also* Final Results at 8,937-38 (noting that the fact that "the sales to both markets [were] made to the same customer" is not "compelling").

<sup>7</sup> Plaintiffs do not assert that Commerce failed to accurately follow the procedures set out in the statute; rather, Plaintiffs argue that the term "fair comparison" creates a separate, general requirement of fairness under § 1677b(a), such that the totality of the circumstances surrounding the normal value determination must be inherently "fair" in order to meet the statute's requirements. *See* Pl.'s Mem. at 13-16. The Court has not found, nor have Plaintiffs presented, any authority supporting a construction of "fair comparison" as a separate or freestanding requirement. The Court, however, concludes on the basis of the record in this matter that Commerce did in fact achieve a fair comparison in compliance with the statute, and does not reach the question of whether the statute includes a separate requirement of fairness.

In the course of its investigation in the fifth administrative review, Commerce conducted a verification of NSC's responses to Commerce's questionnaires, including responses concerning sales processes, pricing arrangements, and NSC's relationships with Customer A and Corporation B. See Verification Memo. Commerce verified that "NSC's sales negotiation process with [Customer A] in the home market is the same as that with its other unaffiliated customers." Def.'s Mem. at 5 (citing Verification Memo. at 2-3); see also Verification Memo. at 10-11 (describing the sales process with Customer A and Corporation B); NSC Section A Response at A-20 - A-22 (describing the sales process with unaffiliated companies in general). Commerce also verified that "[c]hanges in NSC's prices since 1991 were applied to all customers" and that "NSC's prices to [Corporation B] [always varied from] those for other \* \* \* customers." Def.'s Mem. at 6 (citing Verification Memo. at 11, Ex. 37). As noted by the Defendant, if price manipulation were taking place, Commerce would have expected to find certain price adjustments for products destined for Corporation B since the implementation of the antidumping order. *Id.* at 14-15. However, Commerce's findings regarding NSC's pricing and sales practices did not suggest any price adjustments which might indicate price manipulation to affect dumping margins.<sup>8</sup> See *id.* at 6, 15-16; Verification Memo. at 10-11, Ex. 37 at 69; NSC Supplementary Response to Sections A-D of the Antidumping Questionnaire, Pro. Doc. No. 27, Pub. Doc. No. 86 at 11-12 (Feb. 18, 1999).

Finally, Defendant notes that it would be permissible for NSC, Customer A, and Corporation B to agree to reduce home market prices for goods destined to Corporation B. See Def.'s Mem. at 19-20. The purpose of the antidumping statute is to prevent dumping, which entails reducing or eliminating discrepancies in pricing between the U.S. and foreign markets. See *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994) (stating that "[t]he purpose of the [Tariff Act of 1930] is to prevent dumping"); *Koyo Seiko Co. v. United States*, 20 F.3d 1156, 1159 (Fed. Cir. 1994) (stating that the purpose of the antidumping statute is "to protect domestic manufacturing against foreign manufacturers who sell at less than fair market value"); see also *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990) (indicating that the "basic purpose of the statute" is "determining current margins as accurately as possible"). This may be achieved by either raising U.S. prices or by lowering the home market prices. See Fourth Review at 12,954 (stating that "it is permissible for a respondent to reduce or eliminate dumping either by raising its U.S. prices or by lowering its home market prices of merchandise subject to the order") (citing *Notice of Final Results of Antidumping Duty Administrative Review: Furfuryl Alcohol from the Republic of South Africa*, 62 Fed. Reg. 61,084, 61,085 (Dep't Commerce Nov. 14, 1997); *Tapered Roller Bearings and Parts Thereof*,

<sup>8</sup> Exhibit 37 indicates that | | for other end users | |. See Verification Memo., Ex. 37 at 69; Def.'s Mem. at 6, 14-15. | | between 1991 and the period of review | | for Corporation B, | | for other end users. Verification Memo., Ex. 37 at 69; Def.'s Mem. at 15. Additionally, Commerce verified that | |. See Verification Memo. at 10; NSC Supplementary Response to Sections A-D of the Antidumping Questionnaire, Pro. Doc. 27, Pub. Doc. 86 at 11-12 (Feb. 18, 1999).

*Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews and Termination in Part*, 62 Fed. Reg. 11,825, 11,831 (Dep't Commerce Mar. 13, 1997) (stating that a firm has discretion to choose a method for eliminating price discrimination, and that "a respondent may act to eliminate the price differential by (1) increasing its U.S. prices, (2) lowering its home market prices, or (3) undertaking a combination of the two").

The record shows no evidence of inaccurate reporting or price manipulation by NSC, Customer A, and Corporation B. Based on this record, Commerce concluded that there was insufficient indication of the potential for price manipulation to warrant exclusion of the sales. *Cf. Koenig*, 22 CIT at \_\_\_, 15 F. Supp. 2d at 840-41. Because Commerce's conclusion is based on reasonable inferences drawn from evidence in the record, it is supported by substantial evidence.

In addition, nothing in the statute requires Commerce to investigate further. The statute requires Commerce to verify information but leaves the scope of verification and the procedures for conducting it to Commerce's discretion. See 19 U.S.C. § 1677m(i); see also 19 C.F.R. § 351.307. This Court has held that when evidence reaches the level of reasonable suspicion, Commerce must investigate further. See *Zenith*, 15 CIT at 406-07, 770 F. Supp. at 659. But the mere possibility that prices could be manipulated is insufficient grounds to require the agency to disregard sales in the absence of evidence creating a basis for reasonable suspicion of actual manipulation.<sup>9</sup> Accordingly, the agency's decision is in accordance with law.

## II. Ordinary Course of Trade

As noted above, 19 U.S.C. § 1677b(a) requires that in calculating a dumping margin, a "fair comparison shall be made between the export price or constructed export price and normal value." One criterion for the normal value determination is that the sale is "in the ordinary course of trade."<sup>10</sup> The purpose of the ordinary course of trade provision is to avoid a calculation of normal value and dumping margins that is based on sales that are not representative of the market in question. *Ce-*

<sup>9</sup> Commerce disregards sales due to the possibility of price manipulation when dealing with transactions among affiliated entities. See *SSAB Svenska Stal AB v. United States*, 21 CIT 1007, 1009, 976 F. Supp. 1027, 1030 (1997) (stating that "Commerce's normal practice is to disregard the manufacturer's prices to its related distributors or dealers in calculating foreign market value unless the manufacturer demonstrates to Commerce's satisfaction that the prices are at arm's length"); see also *Koenig & Bauer-Albert AG v. United States*, 24 CIT \_\_\_, \_\_\_, 90 F. Supp. 2d 1284, 1287 & n.5 (2000), *aff'd in part, vacated in part by Koenig & Bauer-Albert AG v. United States*, 259 F.3d 1341 (Fed. Cir. 2001) (noting that "[i]n determining whether to collapse related or affiliated companies, the Department must decide whether the affiliated companies are sufficiently intertwined as to permit the possibility of price manipulation") (quoting *Notice of Final Determination of Sales at Less Than Fair Value: Certain Pasta from Italy*, 61 Fed. Reg. 30,326, 30,351 (Dep't Commerce June 14, 1996)); *FAG (U.K.) Ltd. v. United States*, 22 CIT \_\_\_, \_\_\_, 24 F. Supp. 2d 297, 302 (1998) (stating that "Commerce collapses parties when it determines that the companies are so interrelated to each other that there is a possibility of price manipulation"). The Court has found no authority suggesting that Commerce disregard sales in other circumstances due to the mere possibility of price manipulation, without some further evidence suggesting that manipulation is a genuine risk. *Cf. Fed.-Mogul Corp. v. United States*, 20 CIT 234, 263-64, 918 F. Supp. 386, 411-12 (1996) (upholding Commerce's decision to use transfer prices where Commerce verified random sample prices and where there was no evidence of price manipulation).

<sup>10</sup> See the definition of normal value as stated in 19 U.S.C. § 1677b(a)(1)(B) in note 6, *supra*.

*mex, S.A. v. United States*, 133 F.3d 897, 900 (Fed. Cir. 1998) (quoting *Monsanto Co. v. United States*, 12 CIT 937, 940, 698 F. Supp. 275, 278 (1988)).

Ordinary course of trade is defined in 19 U.S.C. § 1677(15) as "the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind." The statute explicitly labels two types of transactions as outside the ordinary course of trade.<sup>11</sup> In cases not falling within the statutory exclusions, Commerce has discretion to determine on a case-by-case basis which transactions fall outside the ordinary course of trade. See *Torington Co. v. United States*, 25 CIT \_\_\_, \_\_\_, 146 F. Supp. 2d 845, 861-62 (2001); *Bergerac, N.C. v. United States*, 24 CIT \_\_\_, \_\_\_, 102 F. Supp. 2d 497, 507 (2000). Commerce's procedures for making an ordinary course of trade determination are found in 19 C.F.R. § 351.102 (2000). The regulations require examination of the totality of the circumstances in order to avoid basing home market value on sales or transactions that are "extraordinary for the market in question." 19 C.F.R. § 351.102(b). The regulations state that

[t]he Secretary [of Commerce] may consider sales or transactions to be outside the ordinary course of trade if the Secretary determines, based on an evaluation of all of the circumstances particular to the sales in question, that such sales or transactions have characteristics that are extraordinary for the market in question.

*Id.* The ordinary course determination is highly fact-specific, and Commerce looks at all the circumstances surrounding the transactions in question. It does not focus on a single circumstance in isolation. See *NSK Ltd. v. United States*, slip op. 01-69, at 37 (CIT June 6, 2001); *Bergerac*, 24 CIT at \_\_\_, 102 F. Supp. 2d at 505, 507, 509; *Murata Mfg. Co., Ltd. v. United States*, 17 CIT 259, 264, 820 F. Supp. 603, 607 (1993). Section 351.102(b) provides additional examples of transactions considered outside the ordinary course of trade, including those involving

off-quality merchandise or merchandise produced according to unusual product specifications, merchandise sold at aberrational prices or with abnormally high profits, merchandise sold pursuant to unusual terms of sale, or merchandise sold to an affiliated party at a non-arm's length price.

#### 19 C.F.R. § 351.102(b).

Commerce determines what is ordinary for the market in question by looking at market conditions, practices, and other sales. It then

<sup>11</sup> 19 U.S.C. § 1677(15) states that

The administering authority shall consider the following sales and transactions, among others, to be outside the ordinary course of trade:

(A) Sales disregarded under section 1677b(b)(1) of this title.

(B) Transactions disregarded under section 1677b(f)(2) of this title.

Section 1677b(b)(1) addresses prices that are less than the cost of production, while § 1677b(f)(2) addresses transactions between affiliated parties. The phrase "among others" indicates that these two exclusions are not the only permissible exclusions. This Court has found that the statute and legislative history are "ambiguous as to what constitutes a sale outside the ordinary course of trade." *NSK Ltd. v. United States*, slip op. 01-69, at 37 (CIT June 6, 2001).

compares the transactions in question to see if they exhibit characteristics that are extraordinary for the market. See, e.g., *NTN Bearing Corp. of Am. v. United States*, 25 CIT \_\_\_, \_\_\_, 155 F. Supp. 2d 715, 733 (2001); *Mantex, Inc. v. United States*, 17 CIT 1385, 1402-03, 841 F. Supp. 1290, 1305-06 (1993). Sales with characteristics that are extraordinary for the market may be excluded. 19 C.F.R. § 351.102(b); *Torrington*, 25 CIT at \_\_\_, 146 F. Supp. 2d at 860-62.

The party seeking to exclude sales from the price comparison has the burden of demonstrating that the sales in question are extraordinary for the market and outside the ordinary course of trade. *Bergerac*, 24 CIT at \_\_\_, 102 F. Supp. 2d at 509, *NTN Bearing Corp. of Am. v. United States*, 19 CIT 1165, 1172, 903 F. Supp. 62, 68-69 (1995); *Murata*, 17 CIT at 264, 820 F. Supp. at 606. Absent adequate evidence of extraordinary characteristics, Commerce includes the sales in its margin calculation. See *NTN Bearing Corp.*, 25 CIT at \_\_\_, 155 F. Supp. 2d at 733; *Torrington*, 25 CIT at \_\_\_, 146 F. Supp. 2d at 862-63; *Bergerac*, 24 CIT at \_\_\_, 102 F. Supp. 2d at 509.

The transactions in question here are within neither the specifically excluded categories in 19 U.S.C. § 1677(15) nor the examples in 19 C.F.R. § 351.102(b).<sup>12</sup> As the instant case is not explicitly addressed in the statute and regulations, Commerce was required to examine the totality of the circumstances to determine whether the sales are within the ordinary course of trade. The parties to this action acknowledge Commerce's discretion to determine whether a sale or transaction is in the ordinary course of trade.<sup>13</sup> See Pl.'s Mem. at 25; Def.'s Mem. at 24; Def. Int.'s Mem. Opp'n Pl.'s Mem. Supp. Mot. J. Agency R. at 32.

In its Final Results here, Commerce notes that the greater the volume of sales sought to be excluded as outside the ordinary course of trade, the more evidence is required to support exclusion. Final Results at 8,940.<sup>14</sup> Plaintiffs assert that the sales in question are outside the ordinary course of trade because (1) there is a "discernable pattern of lower home market sales prices" to [Corporation B] when compared to home market sales of the same merchandise to other customers," Pl.'s Mem. at 28 (referring to the Fourth Review at 12,955), and (2) there existed financial

<sup>12</sup> There is no indication that the sales were below cost, see 19 U.S.C. § 1677b(b)(1), or that the sales were between affiliates at non-market prices. See 19 U.S.C. § 1677b(f)(2). There is also no indication that the sales involve abnormally high profits, unusual product specifications, or unusual terms of sale. See 19 C.F.R. § 351.102(b).

<sup>13</sup> The Statement of Administrative Action, accompanying H.R. Rep. No. 103-826 (1994), reprinted in 1994 U.S.C.A.N. 4040 ("SAA"), accompanying the U.S. implementing legislation for the Uruguay Round Antidumping Agreement is "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

The SAA states that "Commerce may consider other types of sales or transactions to be outside the ordinary course of trade when such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market." SAA at 834. The SAA further states that although section 771(15) (19 U.S.C. § 1677(15)) does not establish an exhaustive list of excluded transactions, "the Administration intends that Commerce will interpret section 771(15) in a manner which will avoid basing normal value on sales which are extraordinary for the market in question, particularly when the use of such sales would lead to irrational or unrepresentative results." *Id.* Thus, the SAA indicates that Congress granted Commerce interpretive authority to determine whether transactions are in the ordinary course of trade.

<sup>14</sup> When Commerce does exclude sales as outside the ordinary course of trade, it must provide a complete explanation of its reasons for excluding the sales. *Bergerac*, 24 CIT at \_\_\_, 102 F. Supp. 2d at 509; *NTN Bearing Corp. of Am. v. United States*, 19 CIT 1221, 1229, 905 F. Supp. 1083, 1091 (1995).

incentives and opportunities for NSC, Corporation B, and Customer A to manipulate prices. See Pl.'s Mem. at 30, 32.

Commerce concluded that the sales were in the ordinary course of trade. First, Commerce noted that the volume of home market sales in question is very large. "[T]he existence of a small quantity of sales of a certain type is one factor Commerce considers when assessing whether sales had been made outside the ordinary course of trade." Final Results at 8,940 (citing *Mantex*, 17 CIT at 1405-06, 841 F. Supp. at 1307-08 (1993)). Whether sales were outside the ordinary course depends on whether they are unlike "sales of merchandise of the same class or kind generally made in the home market." Final Results at 8,940. The greater the volume of sales in question,

the more difficult it becomes to separate the sales in question from those 'generally' made in the home market. Therefore, we believe that as the percentage of sales in question rises, so should the overall evidentiary requirements supporting a finding of sales outside the ordinary course of trade be all the more rigorous.

*Id.* at 8,940.

Ultimately, Commerce "[did] not find the record evidence determinative in either direction" with regard to relative pricing. *Id.* As noted earlier, Commerce's investigation found no evidence of price manipulation. See *supra* p. 9-10. Further, Commerce noted that "the mere presence of evidence, or even the actual existence, of lower average prices to one unaffiliated customer" is not necessarily sufficient evidence to consider a sale to be outside the ordinary course of trade. Final Results at 8,940. Commerce also stated that it must evaluate "all the circumstances particular to the sales in question." *Murata*, 17 CIT at 264, 820 F. Supp. at 607 (internal citations and quotations omitted). Thus, Commerce noted the existence of non-price factors relevant to its determination, including "the relative volume of sales to the customer in both markets" and the fact that sales to the same customer in both markets were not unusual.<sup>15</sup> Final Results at 8,940. Sales of NSC's products destined for Corporation B constitute a substantial percentage of total NSC sales, see Verification Memo., Ex. 37 at 72, while sales destined for the U.S. market constitute a smaller percentage of total NSC sales. See NSC Quantity and Value Reconciliation, Pro. Doc. No. 49, QV Summary Worksheet at 1-2 (June 8, 1999). Further, the high volume of home market sales and the low volume of U.S. sales also suggest that there is little commercial incentive for NSC to manipulate its home market prices to reduce the dumping margin, which will affect only a small percentage of its total sales. Final Results at 8,940; see also Fourth Review at 12,955. NSC, Customer A, and Corporation B have a long-standing commercial rela-

<sup>15</sup> Commerce stated

We also find that the non-price factors we considered in support of our finding in the fourth review (*i.e.*, the relative volume of sales to the customer in both markets suggested there was little commercial incentive for the respondent to engage in the suppression of home market prices to eliminate hypothetical margins; there was nothing unusual about the fact that there were sales made to both markets through one customer) are equally applicable in this review.

Final Results at 8,940.

tionship, and Corporation B is a significant home market end user of CRS and of NSC's output. See Verification Memo. at 11 (indicating that the relationship dates from at least 1991) and at Ex. 37 at 70, 72 (showing the proportion of NSC's products sold to Corporation B). These facts provide evidence of legitimate commercial reasons leading NSC to enter into certain pricing and sales arrangements<sup>16</sup> with Customer A and Corporation B.

Plaintiffs attempt to inflate the significance of the pricing treatment provided to Corporation B by applying the arm's length test for price comparability, used to assess whether prices in transactions between *affiliates* are at market rates. The test requires the prices paid by affiliates to be 99.5% of the prices paid by unaffiliated parties in order to be considered market rate. Plaintiffs offer no authority supporting the use of the test to evaluate transactions between *unaffiliated* parties, as are present here. Rather, Plaintiffs suggest that the purpose of the test supports extending its use to unaffiliated parties. According to Plaintiffs, the test is used to determine whether prices are influenced by a relationship between the parties, and therefore is appropriate to use here. However, there is no authority supporting the extension of the test to transactions between unaffiliated companies. Moreover, it is logical that Commerce would apply a different standard and procedure in evaluating transactions between affiliates, which are less transparent and less amenable to verification than transactions between unaffiliated entities.

Plaintiffs have the burden of providing sufficient evidence to justify exclusion of the sales as outside the ordinary course of trade. In the absence of sufficient evidence to justify exclusion, transactions are considered in the ordinary course of trade and are included in the price comparison. Plaintiffs' only evidence supporting exclusion of the sales is the pricing treatment<sup>17</sup> for merchandise destined for Corporation B. See Pl.'s Mem. at 28-30. Analyzing the facts gathered during its investigation, Commerce drew reasonable inferences from those facts to conclude that the sales were not outside the ordinary course of trade as there were legitimate commercial reasons why such a pattern might exist. Accordingly, Commerce's decision to consider the sales in the ordinary course of trade is supported by substantial evidence on this record.

#### CONCLUSION

For the reasons discussed in this opinion, Commerce's Final Results are sustained and Plaintiffs' motion for judgment upon the agency record is denied.

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<sup>16</sup> Such pricing and sales arrangements | |. See *supra* note 5; see also Verification Memo., Ex. 37 at 69.

<sup>17</sup> Namely, a | |.

(Slip Op. 01-140)

FABRIQUE DE FER DE CHARLEROI S.A., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND BETHLEHEM STEEL CORP AND U.S. STEEL GROUP, A UNIT OF USX CORP., DEFENDANT-INTERVENORS

Court No. 98-02-00359

[Commerce's *Remand Results* are affirmed in their entirety. Case dismissed.]

(Dated December 4, 2001)

*Barnes, Richardson & Colburn (Gunter von Conrad and Michael J. Chessler)* for plaintiff, Fabrique de Fer de Charleroi S.A., currently Usinor Industeel, SA.

*Robert D. McCallum, Jr.*, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Velta A. Melnbrensis*, Assistant Director); of counsel: *Robert L. LaFrankie*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for the United States.

*Dewey Ballantine LLP (Michael H. Stein, Bradford L. Ward and Rory F. Quirk)* for defendant-intervenor Bethlehem Steel Corporation and defendant-intervenor U.S. Steel Group, a Unit of USX Corporation, currently United States Steel LLC.

## JUDGMENT

I. *Standard of Review*

TSUCALAS, *Senior Judge*: The Court will uphold Commerce's re-determination pursuant to the Court's remand unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966).

II. *Background*

This case concerns *Final Results of Redetermination Pursuant to Court Remand on Certain Cut-to-Length Carbon Steel Plate from Belgium* ("*Remand Results*"), *Fabrique de Fer de Charleroi S.A. v. United States* ("*Fabrique*"), 25 CIT \_\_\_, 155 F. Supp. 2d 801 (2001), ensuing from *Final Results of Antidumping Duty Administrative Review of Certain Cut-to-Length Carbon Steel Plate From Belgium* ("*Final Results*"), 63 Fed. Reg. 2959 (Jan. 20, 1998), issued by the United States Department of Commerce, International Trade Administration ("*Commerce*"). The *Final Results*, in turn, ensue from the antidumping duty order on cut-to-length carbon steel plate imported to the United States from Belgium during the 1995-96 period of review ("*POR*").

During the review, Commerce: (1) determined that the United States sale of the cut-to-length carbon steel plate by Fabrique de Fer de Charleroi S.A. ("FAFER") was a constructed export price ("CEP") sale, that is, a sale for which price had to be adjusted under subsections (c) and (d) of 19 U.S.C. § 1677a (1994) to account for FAFER's various direct and indirect selling expenses, *see Fabrique*, 25 CIT at \_\_\_, 155 F. Supp. 2d at 805; and (2) issued questionnaires to FAFER, seeking data on FAFER's indirect selling expenses related to FAFER's United States sale. In its responses to Commerce's questionnaires, FAFER stated that there were no indirect selling expenses incurred by FAFER in the United States or, alternatively, that all indirect selling expenses had been allocated based on information in FAFER's response. *See id.*, 25 CIT at \_\_\_, 155 F. Supp. 2d at 804. Missing the information on FAFER's indirect selling expenses, Commerce, in reaching the applicable determination, resorted to facts available, *see id.*, 25 CIT at \_\_\_, 155 F. Supp. 2d at 805, specifically to the commission rate FAFER normally paid FAFER's United States affiliates. *See Final Results*, 63 Fed. Reg. at 2962-63.

The Court affirmed Commerce's use of facts available, *see Fabrique*, 25 CIT at \_\_\_, 155 F. Supp. 2d at 808, but ordered Commerce to choose another facts available substitute for FAFER's indirect selling expenses because the record indicated that Commerce had determined that no commission was actually paid on the United States sale in question. *See id.*, 25 CIT at \_\_\_, 155 F. Supp. 2d at 809-10. The Court noted that

[it] share[d] FAFER's bewilderment about Commerce's choice to use the only piece of data admittedly unrelated to the transaction at issue as a proxy for FAFER's indirect selling expenses. There could be no rational relationship between a matter and \* \* \* data that expressly does not apply to that matter under the particular facts of the case.

*Id.* (internal citations omitted).

In accordance with the Court's remand, Commerce recalculated CEP resorting to another facts available, namely, selling, general and administrative expenses ("SG&A") of FAFER's United States subsidiary, Charleroi USA ("Charleroi"). *See Remand Results* at 3-4.

### III. Contentions of the Parties

FAFER asserts that Charleroi's SG&A are unrelated to indirect selling expenses actually incurred by FAFER. *See Pl.'s Comments Final Results Redetermination Pursuant Ct. Remand* ("Pl.'s Comments") at 2-3; Pl.'s Rebuttal Comments Final Results Redetermination Pursuant Ct. Remand ("Pl.'s Rebuttal") at 2. Specifically, FAFER contends that Charleroi's SG&A: (1) bear no rational relationship to the actual expenses incurred by FAFER; (2) cannot be representative of the sale transaction that took place in 1996 because Charleroi's statement covers the 1995 calendar year; (3) is preempted by the data provided by FAFER in FAFER's responses to Commerce's questionnaires. *See generally*, Pl.'s Comments, Pl.'s Rebuttal. Therefore, FAFER concludes that Commerce's decision to use Charleroi's SG&A as a substitute for

FAFER's United States indirect selling expenses is a violation of this Court's remand order in *Fabrique*, 25 CIT at \_\_\_, 155 F. Supp. 2d at 813. FAFER further asserts that FAFER's indirect selling expenses, if any, were minimal. See Pl.'s Rebuttal at 4.

Commerce contends that Commerce's use of Charleroi's SG&A as a facts-available proxy for FAFER's United States indirect selling expenses was in accordance with the Court's remand in *Fabrique*, 25 CIT at \_\_\_, 155 F. Supp. 2d at 813. See *Remand Results* at 3-5, Def.'s Rebuttal Pl.'s Comments Final Results Redetermination Pursuant Ct. Remand ("Def.'s Rebuttal") at 4-8. Bethlehem Steel Corporation and U.S. Steel Group support Commerce's reliance on Charleroi's SG&A and point out that the case was remanded to Commerce "for one—and only one—purpose: 'to examine the record to determine what data should be used as a substitute for FAFER's indirect selling expenses'" and not to "relitigate the merits of [Commerce's] underlying determination regarding FAFER's U.S. indirect selling expenses." See Def.-Intervenors' Rebuttal Comments Pl.'s Comments Final Results Redetermination Pursuant Ct. Remand ("Def.-Intervenors' Rebuttal") at 4.

### III. Analysis

#### A. Reasonableness of Facts Available

The main argument presented by FAFER is that: (1) the facts available chosen by Commerce "bear[] no rational relationship to [the] expenses *actually* incurred," Pl.'s Rebuttal at 2 (emphasis in original); and (2) the only reasonable facts available that could be used in the given case "is the amount originally calculated in the Sales Verification Report." *Id.* at 4.

FAFER misreads the purpose of the Court's remand in *Fabrique*, 25 CIT at \_\_\_, 155 F. Supp. 2d at 813, as well as the purpose and gist of the term "facts available." Facts available are, by definition, a proxy figure used by an agency when the agency lacks actual data necessary for the calculation.<sup>1</sup> Indeed, if the agency had the actual figure and failed to use it, such action would be a violation of the agency's statutory duty. Conversely, if the agency lacks the actual figure, a reading of the statute as a requirement to use "facts available" that should be, de facto, actual data would render the statutory purpose of 19 U.S.C. § 1677e obsolete. Indeed, it would be anomalous to require the agency to use the "de facto actual data" where the agency has none; such scheme would serve as an incentive to members of the regulated industry to conceal the actual data and obtain a premium if they could succeed in obstructing the agency's operation while keeping a cooperative disguise. In sum, reliance on "facts available" inherently implies the usage, wholly or partly, of surrogate data that is not actual. Consequently, in the case at bar, if "the amount originally calculated in the Sales Verification Report," Pl.'s

<sup>1</sup> "In general, [i]f \*\*\* necessary information is not available on the record, or \*\*\* an interested party or any other person \*\*\* fails to provide such information \*\*\* in the form and manner requested \*\*\* or \*\*\* provides such information but the information cannot be verified \*\*\*, [Commerce] shall \*\*\* use the facts otherwise available in reaching the applicable determination \*\*\*." 19 U.S.C. § 1677e(a) (1994).

Rebuttal at 4, does not include all of FAFER's possible indirect selling expenses in the given transaction,<sup>2</sup> Commerce must resort to facts available, that is, data necessarily other than the amount designated in the Sales Verification Report.

The issue, therefore, is what facts available would constitute reasonable surrogate data. Admittedly, there cannot be a bright-line test or all-inclusive definition. Rather, the issue shall be decided on a case-by-case basis. The Court, however, pointed out that reasonable surrogate data is "the most reasonable estimate," \* \* \* that is, the estimate most rational under the circumstances. \* \* \* among the entire data available on the record. *Fabrique*, 25 CIT at \_\_\_\_ n.4, 155 F. Supp. 2d at 810 n.4 (emphasis omitted). Moreover, "[t]he mere possibility that [a random figure chosen] could be an amount near the amount [that would be] arrived [at] on the basis of [reasonable surrogate data]" cannot validate that random figure. *Id.* Therefore, the Court holds that: (1) surrogate data does not have to be necessarily related to the data missing; and (2) it is permissible to analogize the missing item to an item from the groups that are probably present in the transaction but not to an item from the groups that are admittedly not a part of the transaction. Indeed, any conclusion otherwise would be a perfect sophism; Commerce, then, would be required to derive surrogate data from the very data missing, wholly or partly, in other words, to fasten Commerce's calculations to a vacuum.

This is exactly the point misinterpreted by FAFER. FAFER reads *Fabrique*, 25 CIT at \_\_\_\_, 155 F. Supp. 2d at 810, to mean that the proxy figure shall bear a "rational relationship to any indirect selling expenses actually incurred" by FAFER. Pl.'s Comments at 2 (emphasis in original). The Court, however, remanded *Fabrique*, 155 F. Supp. 2d. 801, not because Commerce failed to use a surrogate figure related to the *expenses actually incurred* by FAFER, but rather because Commerce chose to use a figure that admittedly could not have been analogized with the data missing in the transaction under review. *See id.*, 25 CIT at \_\_\_\_, 155 F. Supp. 2d 809-10.

<sup>2</sup> FAFER asserts "[t]he amount that should serve as a proxy for [FAFER's United States] indirect selling expenses is zero because of the circumstances of the sale in question." Pl.'s Rebuttal at 4. In support of this position, FAFER points out that during the transaction at issue "FAFER did not follow [FAFER's] general practices," and Commerce verified the fact that "the particular sale in question [is] not \* \* \* a normal sale, since it was a single sale." Pl.'s Comments at 1-2. FAFER further adds that the transaction at issue was unique because of the fact that Charleroi had minimal participation in the sale. *Id.* at 2.

This very last claim was disputed by Commerce which noted that

[Commerce] has determined that [Charleroi] did act as more than a processor of sales documents and a communications link between the unaffiliated U.S. customer and FAFER \* \* \*. Although FAFER sets minimum list prices, [Charleroi] negotiates the sale with the customer. \* \* \* [Charleroi] essentially negotiates all sales in accordance with FAFER's minimum price list and the sales take place in the United States, not in Belgium.

*Preliminary Results of Antidumping Duty Administrative Review of Cut-to-Length Carbon Steel Plate From Belgium*, 62 Fed. Reg. 48,213, 48,215 (Sep. 15, 1997) (citations omitted).

Thus, Commerce determined that Charleroi's "participation was actually so significant as to warrant classifying the sale as a CEP sale." *Remand Results* at 6. Consequently, Commerce issued questionnaires to FAFER and, missing the information on FAFER's indirect selling expenses, resorted to the facts available.

While the Court does not share Bethlehem and U.S. Steel Group's opinion that FAFER is attempting to relitigate the applicability of facts available (indeed, facts available equal to zero would yield the same net result as the decision that facts available do not apply), the Court finds that FAFER is not assailing the reasoning but rather the result reached by Commerce, which is outside the Court's standard of review. It is the province of an agency and not the Court to examine the record and reach a conclusion on the issue whether the particular sale involves indirect selling expenses. *See Writing Instrument Mfrs. Ass'n, Pencil Section v. United States*, 21 CIT 1185, 1195, 984 F. Supp. 629, 639 (1997).

### B. Charleroi's SG&A as Facts Available

All FAFER's United States sales or other operations are made through Charleroi. See *Remand Results* at 7, Comment 1 (quoting FAFER's Questionnaire Response at 3, Oct. 21, 1996). Charleroi's financial statement covers the period from January 1, 1995, through December 31, 1995, that is, the period overlapping with the POR at issue. In addition, Charleroi's financial statement provides data on Charleroi's SG&A expenses, that is, the ratio of Charleroi's general expenses to the cost of manufacturing. See *Magnesium Corp. of Am. v. United States*, 166 F.3d 1364, 1371 (Fed. Cir. 1999). General expenses can encompass many items, including such common ones as overhead and such occasional ones as financial losses or domestic freight. See, e.g., *American Silicon Techs. v. United States*, 261 F.3d 1371 (Fed. Cir. 2001); *SKF USA, Inc. v. United States*, 254 F.3d 1022 (Fed. Cir. 2001); *Campbell Soup Co. v. United States*, 107 F.3d 1556 (Fed. Cir. 1997).

The missing data at issue is FAFER's indirect selling expenses. Indirect selling expenses may include sales-persons' salaries, warehousing, personnel assistance, pre-sale home-market transportation expenses, expenses incurred by a foreign manufacturer on behalf of its related United States importer, and so on. See generally, *Torrington Co. v. United States*, 68 F.3d 1347 (Fed. Cir. 1995); *Torrington Co. v. United States*, 44 F.3d 1572 (Fed. Cir. 1995); *Asociacion Colombiana de Exportadores de Flores v. United States*, 901 F.2d 1089 (Fed. Cir. 1990). In sum, indirect selling expenses are the expenses that do not result from, or cannot be tied directly to specific sales, but that may reasonably be attributed to such sales. Therefore, FAFER's indirect selling expenses could be analogized to general expenses of Charleroi during the comparable time periods because: (1) FAFER does *all* of its United States business through Charleroi (thus, inclusive of the transaction at issue); (2) the expenses are of comparable nature; and (3) there is no data on record verifying that SG&A are admittedly not a part of the transaction.

Based on the foregoing, the Court affirms the *Remand Results* in their entirety. The "[C]ourt will sustain the determination if it is reasonable and supported by the record as a whole, including whatever fairly detracts from the substantiality of the evidence." *Negev Phosphates, Ltd. v. United States*, 12 CIT 1074, 1077, 699 F. Supp. 938, 942 (1988) (citations omitted, emphasis supplied).

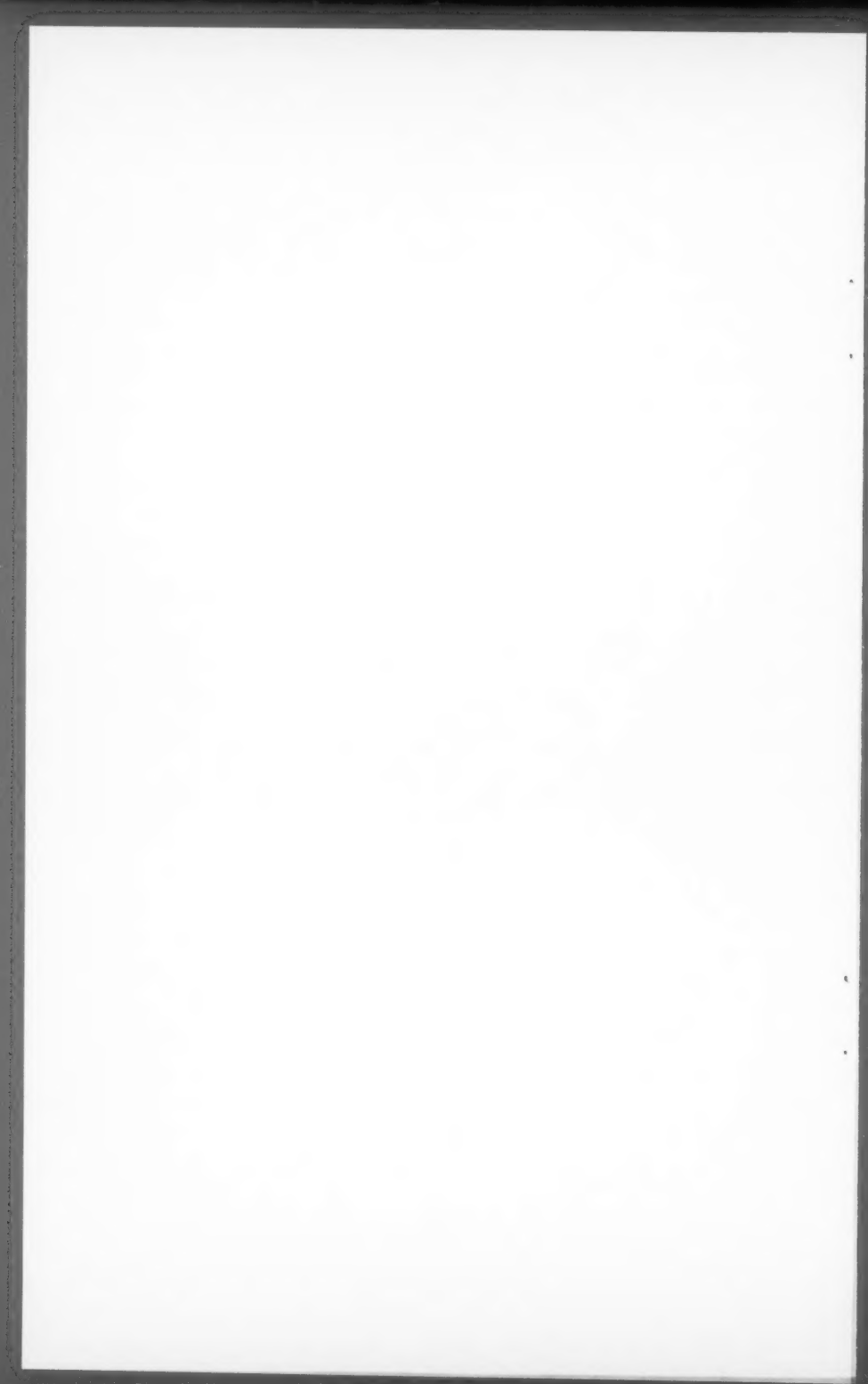
Therefore, this Court concludes that Commerce has complied with the Court's remand, and it is hereby

ORDERED that the *Remand Results* filed by Commerce on October 1, 2001, are affirmed in their entirety; and it is further

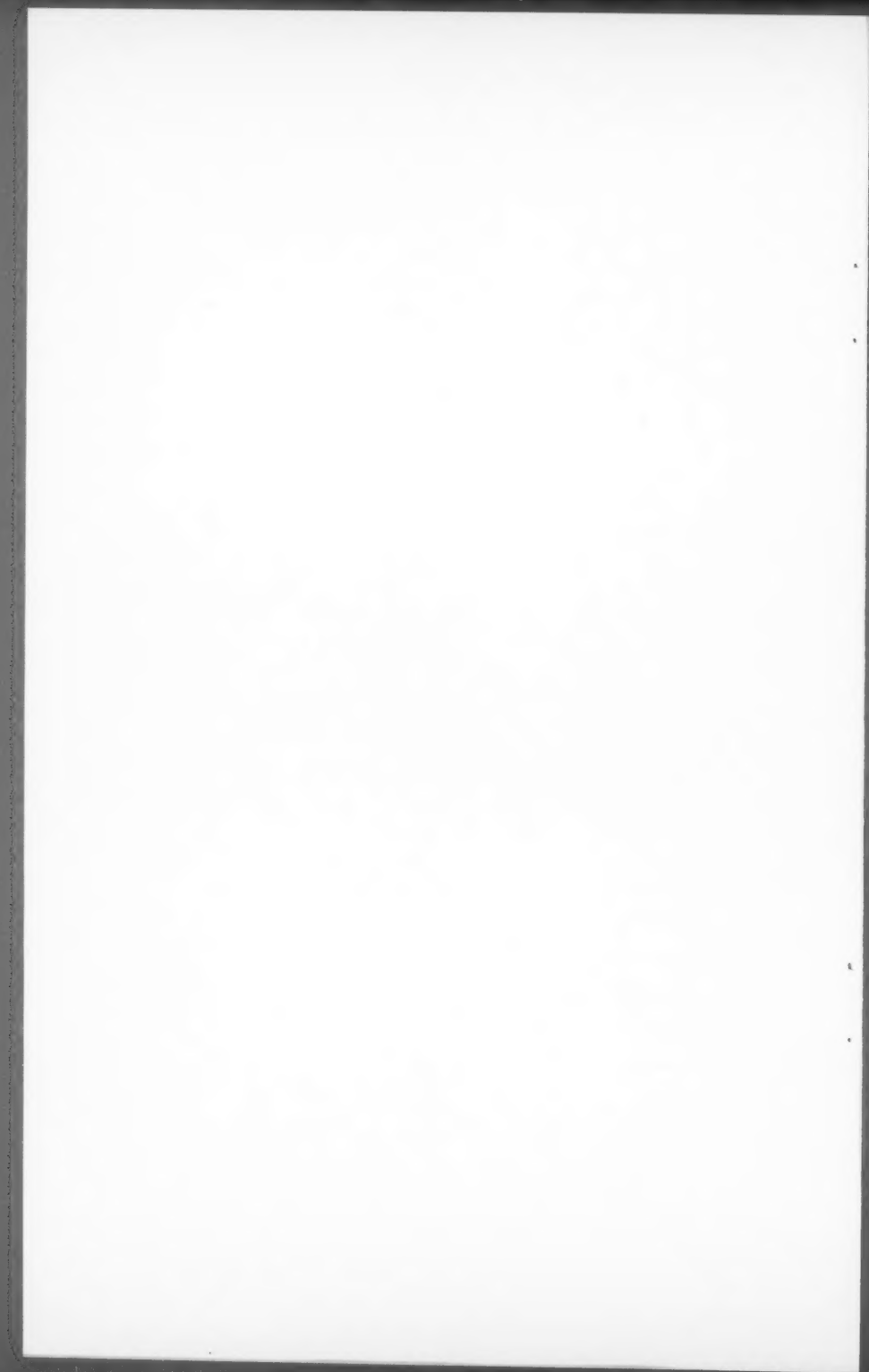
ORDERED that since all other issues were previously decided, this case is dismissed.

## ABSTRACTED CLASSIFICATION DECISIONS

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G91135 12/2/83 Bazilkey, J.	Carini, Inc.	00-04-00147	6402.99.30 37.5%	6402.99.18 6%	Agreed statement of facts	Los Angeles Women's footwear







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